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EDITOR'S NOTE

Prior to the publication of this symposium issue the United States Supreme Court decided the cases of Bush v. Vera, 1996 WL 315857 (U.S. June 13, 1996) and Shaw v. Hunt, 1996 WL 315870 (U.S. June 13, 1996). Both of these cases are extremely relevant to the topic of voting rights litigation and should be given consideration along with the following articles and comments.

INTRODUCTION

Barbara Phillips Sullivan[*]

This Law Journal symposium invites your participation in resolving issues critical to the future of democracy at the local, state and national levels. Sparked by the 1990 redistricting of congressional and legislative districts, the Supreme Court has turned political participation jurisprudence into a volatile arena with successive decisions that call into question the constitutionality of all majority-minority districts.[1] The contributors to this symposium—litigators and scholars engaged in leading cases—offer an opportunity to explore the resulting legal issues and political realities through a discussion of minority vote dilution[2]

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[*] Associate Professor at the University of Mississippi Law School, B.A., Macalester College, 1971; J.D., Northwestern University School of Law, 1976. I teach courses in civil procedure, jurisprudence, constitutional law and voting rights and served on the Advisory Council to the National Civic League in its 1996 publication *Communities and the Voting Rights Act: A Guide to Compliance in these Changing Times*. Intended as a constructive tool for civic leaders, community organizations and government officials to strengthen citizenship and enhance participation in democratic self-government, this handbook answers frequently asked questions about voting rights. A unique feature of the handbook is its presentation of case studies reporting the variety of methods, approaches and experiences of actual communities for whom the process of compliance with the Voting Rights Act, including adoption of a modified at-large electoral system known as cumulative voting by a town of 30,000, has had a positive, transformative effect on citizens and governance. My own proposal for an appropriate constitutional theory of vote dilution is presented in *Reconsidering Reynolds v. Sims: The Relevance of Its Basic Standard of Equality to Other Vote Dilution Claims*, 38 How. L.J. 561 (Summer 1995).

[1] *See* Bush v. Vera, 1996 WL 315857 (U.S. June 13, 1996); Shaw v. Hunt, 1996 WL 315870 (U.S. June 13, 1996); Miller v. Johnson, ____ U.S. ____, 115 S. Ct. 2475 (1995); Shaw v. Reno, ____ U.S. ____, 113 S.Ct. 2816 (1993).

[2] "Vote dilution is a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group. The idea is that one group, voting cohesively for its preferred candidates, is systematically outvoted by a larger group that is also cohesive. If both groups are cohesive or, in other words, vote as opposing blocs, then *racially polarized voting* exists. Dilution can occur as a result of polarization between Democrats and Republicans, between rural voters and urban ones, or between any other identifiable factions in the electorate." Quiet Revolution

and the use of racial classifications in the context of challenges to legislative redistricting plans and at-large election systems.

In our democratic society, the active participation of citizens in the electoral process is valued as a prerequisite to the legitimacy of society and government as citizens participate in decisions about elected representatives, policies, and the allocation of resources at the local, state and national levels. Citizen participation is also valued because our society needs the contribution of citizens' diverse perspectives, talents and abilities through the electoral process as we grapple with the present and future challenges faced by our society in an increasingly complex world. Consistent with these values, symposium contributor Laughlin McDonald identifies several goals that all Americans should support: (a) equal electoral opportunities for minority citizens; (b) a politics of commonality rather than one of racial difference; and (c) legislative bodies that are more inclusive, reliable and less prone to bias. Indeed, all the contributors seem to express support for these goals. What follows is an engaging discussion of significant differences among the contributors about political realities and the appropriate interpretation of constitutional protections and statutory law relevant to achieving those goals.

The Supreme Court first entered the "political thicket" of vote dilution claims in 1962 when it concluded in *Baker v. Carr*[3] that claims of vote dilution attributable to unequal population distribution among state legislative districts were justiciable. Two years later, in *Reynolds v. Sims*[4], the Court held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[5] The Court adopted the "one-person, one-vote" principle but failed to confront and resolve the substantive issues inherent in defining the right to fair and effective representation and, in particular, in defining vote dilution. A year later, in 1965, the Voting Rights Act was enacted and provided a statutory basis for claims of minority vote dilution. Claims of minority vote dilution based upon constitutional protections did not reach the Court until 1971 when *Whitcomb v. Chavis*[6] revealed the considerable difficulty of transferring the

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IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, 22 (Chandler Davidson & Bernard Grofman eds., 1994).

[3] 369 U.S. 186 (1962).

[4] 377 U.S. 533 (1964).

[5] *Id.* at 555 (footnote omitted).

[6] 403 U.S. 124 (1971).

constitutional protections articulated in the malapportionment dilution context to claims of dilution arising from the function of race in the electoral process.

To participate in the discussion of this symposium it is necessary to distinguish between constitutional jurisprudence and claims brought under the federal Voting Rights Act. In 1980, the Court held that claims of minority vote dilution under both the Voting Rights Act and the Fourteenth Amendment to the Constitution required proof of intentional discrimination.[7] That decision galvanized concerned citizens and resulted in the 1982 amendment of section 2 of the Voting Rights Act to prohibit voting practices that result in discrimination, regardless of any intent to discriminate.[8] The legislative history reflects Congressional concern that, inter alia, the intent standard was "unnecessarily divisive" in requiring plaintiffs to prove that members of the community were racist.[9] Thus, the 1982 amendment adopted a "results" test permitting plaintiffs to succeed in a vote dilution claim if under the "totality of circumstances", minority voters were less able than whites "to participate in the political process and to elect representatives of their choice."[10] Of course, the 1982 amendment of the Voting Rights Act did not purport to change the Court's interpretation of the constitution as requiring proof of discriminatory intent. A necessary component of plaintiff's burden under either the Voting Rights Act or the Constitution in a vote dilution case is proof of racially polarized voting. The term "racially polarized voting" refers to electoral behavior in which racial groups vote cohesively and differently in a series of elections; *i.e.*, white voters usually and consistently vote for candidates other than the candidate preferred by African-American voters and African-American voters usually and consistently vote for candidates other than the candidate preferred by white voters.[11]

Defense strategies responsive to the new Supreme Court jurisprudence are suggested in this symposium by practitioner

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[7] City of Mobile v. Bolden, 446 U.S. 55 (1980).

[8] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b) (1982)).

[9] S. Rep. No. 417, 97th Cong., 2d Sess. 28, 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214.

[10] 42 U.S.C. § 1973(b) (1982).

[11] For a concise discussion of racially polarized voting see Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities in* QUIET REVOLUTION IN THE SOUTH 21-37, (Chandler Davidson & Bernard Grofman eds., 1994).

Benjamin E. Griffith. He provides an analysis of relevant cases and detailed advice on strategy and practice including a "checklist" for proposed finding of fact and conclusions of law. Scholars Bernard Grofman and Lisa Handley contribute empirical facts to the discussion of key jurisprudential issues including the willingness of whites to elect minority candidates to office and whether minority districts diminish the incentives for cross-racial coalitions and for white representatives to pay attention to the concerns of black voters in their districts. Practitioner David O'Donnell, offering a model typical of Title VII claims, reintroduces the constitutional intentional discrimination standard into amended section 2 of the Voting Rights Act, proposing that plaintiffs have the burden to prove that the lack of electoral success of the minority preferred candidates is due to racial animus within the majority electorate. Laughlin McDonald provides an overview of the evolution of voting rights jurisprudence and focuses upon the Supreme Court's response to the systematic attack upon the 1990 redistricting plans containing majority-black districts. The McDonald and Griffith articles will be particularly useful to those pondering the merit of the argument that minority participation in the electoral process is enhanced by the creation of influence/competitive districts rather than majority-minority districts. Of interest to many readers will be the empirical data and analyses offered by Grofman, Handley and McDonald concerning the claim that the creation of majority-minority districts led to the downfall of the Democratic Party, particularly in the South.

The *Mississippi Law Journal*'s publication of this vibrant symposium issue makes a valuable contribution to the resolution of issues crucial to the future direction of democracy.

1990s ISSUES IN VOTING RIGHTS

Bernard Grofman[*]

Lisa Handley[**]

I. INTRODUCTION

The Voting Rights Act of 1965,[1] together with the Civil Rights Act of 1964,[2] forms the judicial cornerstone of contemporary race relations in the United States. At the Act's inception, Congress intended to guarantee the full exercise of the franchise to blacks, and later amended it so that it would apply to other minorities as well. Subsequently, the provisions and amendments to the Act have withstood constitutional challenges in the United States Supreme Court. The Court has extended the Act's coverage to virtually all aspects of election organization such as locations of voting booths, redistricting plans, and choice of electoral systems. Thus, the Act now applies to far more than simple denial of the franchise.[3]

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We are indebted to Dorothy Green and Chau Tran for library assistance. This research was partially supported by a grant from the Ford Foundation, #446740-47007, *The Impact of Redistricting on the Representation of Racial and Ethnic Minorities*, to the first-named author. The views expressed in this paper are solely those of the authors and do not reflect those of the Ford Foundation.

[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

[2] Civil Rights Act of 1964, Pub. L. No. 88-52, 78 Stat. 241 (codified as amended at 28 U.S.C. 1447, 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-(6) (1988)).

[3] From a policy perspective, the Act had six key components. First, the 1965 provisions abolished literacy tests. Voting Rights Act of 1965 § 4, 42 U.S.C. §§ 1971(a)(2)(c), 1971(c) (1988). Second, the 1965 provisions prohibited the use of any device that would impose unreasonable financial hardships, such as a poll tax, on persons of limited means as a prerequisite to voting. *Id.* § 10. Third, the 1965

As with other areas of Equal Protection, it has taken a long time for the full scope and consequences of the Act to become clear.

Immediately after passage, the more important provisions of the Act were viewed as those dealing with the protection of the rights of blacks in the South to register and to vote. The protective cloak of the federal government was especially important in some areas of the South where black registration was virtually nil and where intimidation of blacks seeking to exercise the franchise was commonplace.[4]

In the 1970s and 1980s, section 5 (the preclearance provision) of the Act was seen as having the greatest impact. In particular, the Department of Justice refused to preclear plans that contained multimember districts with submerged pockets of black populations large enough to form the core of single-member districts.[5] The Department of Justice also began to

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provisions permitted the Justice Department to dispatch federal marshals as observers or registrars in parts of the South to end the denial of the right to vote for blacks. *Id.* § 6. Fourth, the 1965 provisions required jurisdictions covered by section 5 of the Act to submit any proposed changes in their election provisions to the Justice Department for preclearance. *Id.* § 5. Fifth, the 1975 amendments required the use of bilingual ballots in jurisdictions with greater than five percent population whose native language was not English. Voting Rights Act of 1965, Pub. L. No. 94-73, § 301, 89 Stat. 402 (1988) (amended 1975). Finally, the 1982 amendments to section 2 prohibited the use of any electoral device capable of diluting minority voting strength. Voting Rights Act of 1965, Pub. L. No. 97-205, § 2(b), 96 Stat. 131 (1988) (amended 1982).

[4] *See* James E. Alt, *The Impact of the Voting Rights Act on Black and White Registration in the South*, *in* QUIET REVOLUTION IN THE SOUTH 351-55 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter Alt, *Black and White Representation*] (discussing institutional barriers designed to deny blacks franchisement). Alt illustrated that the designers of the southern voting framework attempted to ensure white candidates' election to office through the use of literacy tests, residence requirements, and poll taxes. *Id.* at 354. Whites employed two other methods, the grandfather clause and the white primary, to disenfranchise blacks further. *Id.* The grandfather clause waived requirements for those whose relatives had registered; the white primary allowed only whites to vote in primary party elections on the basis that these parties constituted private organizations. *Id.* Alt also recognized, though, that these institutional impediments did not exist solely in the South. *Id.* at 353.

[5] These preclearance denials (or fear thereof) can be shown to be responsible for a dramatic reduction in the number of state legislators elected from multimember districts in the South and a concomitant increase in the number of black majority seats—seats that were very likely to elect black legislators. *See*

scrutinize closely the fragmentation and the concentration of the black population in single-member district plans, and denied preclearance to districting plans which had the appearance of diluting black voting strength.

After the 1982 amendments to the Act, the new language of section 2 became the basis of most voting rights lawsuits. Although the amended section 2 provisions did not have the prohibitory bite of the section 5 preclearance requirements, the section 2 provisions applied to all jurisdictions and not just covered ones. Furthermore, amended section 2 applied to present plans, not just to changes in election rules. Section 2 challenges have played a central role in ending the discriminatory use of at-large elections at the local level.[6]

The Act continued to have an impact on the 1990s round of redistricting with the Department of Justice taking an aggressive stance regarding standards for section 5 preclearance.[7] Along with threats of section 2 challenges by

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Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, *in* QUIET REVOLUTION IN THE SOUTH 335-36 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter Handley & Grofman, *Black Officeholding*] (discussing Act's impact on increase of number of black districts in South); *see also* Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q., 111, 112 (1991) [hereinafter Grofman & Handley, *Black Representation*] (examining growth of black state legislators since Act's passage); Bernard Grofman & Lisa Handley, *Minority Population Proportion and Black and Hispanic Congressional Success in the 1970s and 1980s*, 17 AM. POL. Q. 436, 437 (1989) [hereinafter Grofman & Handley, *Minority Population*] (explaining recent black and Hispanic congressional gains).

[6] The use of multimember districts violated of section 2 of the Act if: (1) there was a compact contiguous minority population within the multimember district that is large enough to form the basis for at least one majority-minority district if single-member districts were to be drawn; (2) the minority community demonstrated cohesive voting behavior; and, (3) the candidates whom it supported lost with sufficient frequency so as to deny to minority members an equal opportunity to elect candidates of choice. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). For a more detailed analysis of each of these requirements, see BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 61-81 (1992) [hereinafter GROFMAN, MINORITY REPRESENTATION].

[7] In our view, the change in the Administration in 1992 did not have much of an impact on the decisions reached by the Voting Rights Section. In fact, the

minority groups and other private litigants,[8] the Department of Justice's aggressive stance led to the adoption of a record number of new majority-minority districts, most of which elected minorities to office. For example, the number of majority black districts in the South increased from 4 in 1990 to 18 in 1992, and 17 of these new districts elected African-Americans to office. These districts, incidentally, were the only districts in the South to elect African-Americans to Congress.

Triggered by these dramatic gains in black representation and by the peculiar shapes of the majority-minority districts from which these representatives won office, the Act has come under increasing attack.[9] Furthermore, the relationship be-

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Voting Rights Section staff has largely been left free to enforce the Act in accordance with the statutory language and subsequent court decisions regardless of who is president. With the exception of a few key decisions in the 1980s when Bradford Reynolds was Assistant Attorney General for Civil Rights, we believe the Department of Justice has maintained a relatively liberal interpretation of the Act regardless of which party controlled the White House.

[8] One of the present authors characterized the combination of section 5 and section 2 challenges as a "brooding omnipresence" in the decisionmaking calculus of those involved in the 1990s redistricting. *See* Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said, "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZA L. REV. 1237, 1264 (1993) [hereinafter Grofman, *Vince Lombardi*] (stating "redistricting decision makers treated voting rights concerns as their first priority").

[9] Although the Act had been criticized in the 1980s, it had little or no effect on the Act's enforcement in the 1990s round of redistricting. An opponent of the Act, Abigail Thernstrom, recently argued that today's legislators had distorted the framers' intent through the Justice Department's inappropriately rigid and aggressive enforcement of the Act. *See* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 18 (1987) (discussing Act's implementation and development).

In general, however, until very recently the Act had been virtually immune to the backlash against other Fourteenth Amendment jurisprudence involving civil rights and affirmative action. In our view, a number of reasons exist for the strong support the Act has enjoyed until now. First and foremost, the basic goal of the Act, minority enfranchisement, had overwhelming public support. Second, the more controversial aspects of the Act, such as its application to issues of minority vote dilution, were not very visible. By and large, redistricting was a matter of concern for politicians, instead of ordinary citizens. Third, unlike situations involving remedies for employment discrimination (where there are whites who feel they are now being punished for sins they did not commit) the remedies for vote dilution involved equal treatment for the members of all groups. Finally, until quite recently, there had been a substantial bipartisan component to the support of the Act.

tween the Act and redistricting moved from an esoteric concern of specialists to become a matter of major concern to political elites and the press. While the intensity of coverage was strongest in conservative publications such as the *Wall Street Journal* and *U.S. News and World Report*,[10] even relatively liberal news magazines like *Newsweek* portrayed some of the more contorted new majority black seats as undesirable racial gerrymandering.

In a number of districting cases since 1992, the Court has echoed this backlash against the Act. These decisions have reopened old questions regarding the interpretation of the Act and have broken new ground on related constitutional issues. Advocates of minority voting rights now fear that the gains in minority representation of the past several decades may be lost. The three most important recent voting rights cases are *Shaw v. Reno*,[11] *Miller v. Johnson*,[12] and *League of Latin American Citizens (LULAC) v. Clements*.[13] In *Shaw*, the Court enunciated a new type of constitutional violation in the area of districting upon a showing by the plaintiff that "the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."[14] In *Miller*, the

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[10] *See, e.g.*, John Leo, *Electioneering by Race*, U.S. NEWS & WORLD REPORT, Sept. 28, 1992, at 33 (revealing negative aspects of racial gerrymandering in political process). Leo criticized the suspicious cooperation of the Bush Justice Department, the ACLU, and several Democrats and Republicans in assembling a system of racial gerrymandering. *Id.* Leo asserted, "[t]he only losers are the American people, who will have to cope with an even higher level of racial polarization, now being built into the electoral system in a notably high-minded bipartisan manner." *Id.*

[11] 509 U.S. 630, 113 S. Ct. 2816 (1993).

[12] ___ U.S. ___, 115 S. Ct. 2475 (1995).

[13] 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

[14] *Shaw*, 113 S. Ct. at 2828. The Court further explained, "[i]t is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged." *Id.* The Court clarified that its holding only addressed the facts of the present case; specifically, the Court held that the plaintiffs' claim was sufficient to defeat the state appellees' motion to dismiss. *Id.* The Court refused to decide whether the inten-

Court made good on its threat in *Shaw* to overturn a districting plan, stating that one or more of the minority districts in it reflected race as its preponderant or only motivation.[15] The Court held that the newly created third majority black congressional district in Georgia fell under the *Shaw* proscription.[16] In *LULAC*, a majority of the Fifth Circuit, in an en banc ruling, reinterpreted the definition of racial bloc voting[17] in a fashion that we see as incompatible with the descriptive approach to the presence or absence of racial bloc voting taken in *Thornburg v. Gingles*.[18] The *LULAC* court moved away from the straightforward question of whether or not minority candidates of choice regularly lost because of white bloc voting into a consideration of whether or not other factors, such as straight party-line voting, could account for the racial differences in voting patterns.[19]

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tional creation of a majority-minority district always created an Equal Protection claim. *Id.*

[15] *Miller*, 115 S. Ct. at 2494. The Court commented that "carving electorates into racial blocs" will not expunge racial discrimination from our society. *Id.*

[16] *Id.* at 2487. Further, the Court stated that a pattern of discrimination was not necessary for an Equal Protection claim. *Id.* The Court noted, though, that a pattern generally facilitated an evidentiary inquiry. *Id.* (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

[17] *LULAC*, 999 F.2d at 850. The majority agreed with the defendants on appeal that "the district court erred in refusing to consider the nonracial causes of voting preferences they offered at trial." *Id.*

[18] 478 U.S. 30 (1986). In *Gingles*, the Court considered the amendments to section 2 of the Act for the first time. *Gingles*, 478 U.S. at 34. Justice Brennan stated that the question in issue was whether the district court's ruling accurately held that the use of multimember districts in several North Carolina districts "violated § 2 by impairing the opportunity of black voters 'to participate in the political process and to elect representatives of their choice'." *Id.*

Significantly, LULAC also broke new ground in upholding the applicability of section 2 of the Act to judges. *LULAC*, 999 F.2d at 893; *see also* Pamela S. Karlan, *The Application of the Voting Rights Act to Judicial Elections*, *in* RACE AND REDISTRICTING IN THE 1990S (Bernard Grofman ed., forthcoming 1996).

[19] *LULAC*, 999 F.2d at 878. Regarding straight party-line voting, the plaintiffs' expert witness produced data which reflected that 61-77% of whites in one county consistently supported Republicans. *Id.* White voters' support for Republicans did not waiver even when a black Republican challenged a white Democrat. *Id.* Conversely, almost all blacks supported Democrats, even when a white Democrat challenged a black Republican. *Id.* On appeal, the defendants used statistics such as these to support the argument that if party affiliation, instead of race, explained voting behavior then the circuit court should reverse the district court's

Another voting rights case marking a recent retrenchment in voting rights enforcement also merits discussion. In *Presley v. Etowah County Commission*,[20] the Court rejected a finding by the Department of Justice that a change in the allocation of responsibilities among city council members was a change subject to section 5 preclearance.[21] Traditionally, the Justice Department reviewed changes similar to those in issue, authority which the courts had upheld. This reversal of long-standing administrative precedents was particularly troubling because the jurisdictions in question were ones where African-Americans had been elected (or were about to be elected) for the first time.[22]

This essay reflects on each of these decisions and their implications for the continuing evolution of voting rights case law. This essay also discusses another recent voting rights case that does not fit into an anti-Act framework. In *Republican Party of North Carolina v. Hunt*,[23] a district court struck down a statewide at-large election plan for superior court judges in North Carolina as a partisan gerrymander,[24] and

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judgment. *Id.* at 850.

[20] 502 U.S. 491 (1991).

[21] *Presley*, 502 U.S. at 509. Essentially, the Court stated that the allocations concerned the decisionmaking authority and not changes in the rules which governed voting. *Id.* at 507. Expanding the scope of § 5 the Court stated, "§ 5 is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Id.* at 509.

[22] Another case, Holder v. Hall, 114 S. Ct. 2581 (1994), was important not for its decision, but because the concurring opinion by Justice Thomas, joined by Justice Scalia, completely repudiated decades of voting rights jurisprudence. *Holder*, 114 S. Ct. at 2591-2619 (Thomas, J., concurring). In fact, the Court's holding in *Holder* was relatively narrow: Legislative size was not litigable under the Act. *Id.* at 2588. Justice Thomas's concurrence asserted that earlier decisions were wrong in holding that the Act applied to issues of vote dilution. *Id.* at 2591 (Thomas, J., concurring).

[23] 841 F. Supp. 722 (E.D.N.C. 1994), *aff'd as modified*, Republican Party of North Carolina v. North Carolina State Bd. of Elections, No. 94-1057, 1994 WL 263955 (4th Cir. June 17, 1994) (per curiam).

[24] *Hunt*, 841 F. Supp. at 723. Issuing the preliminary injunction the district court judge stated, "[t]he public interest in conducting fair and equal elections and of having the most qualified judges in office will be protected by the relief granted herein." *Id.* at 733. However, this case is now back on remand following the November 1994 election results in which Republican judges were elected for

the Fourth Circuit refused to stay the order.[25] The initial decision in this case marked the first time that *Davis v. Bandemer*,[26] which held that partisan gerrymandering was justiciable,[27] demonstrated any teeth.

Another central concern of this essay will be the link between jurisprudential issues and empirical facts. Normative concerns are at the heart of the general backlash to affirmative action and the view of voting rights as just another type of quota system.[28] Just as one cannot understand the depth of public concern about affirmative action unless we link it to perceptions that it has come to be abused, one cannot understand the nature and magnitude of the present reaction to the Act's enforcement without looking at matters that are less philosophical and more concrete, such as the "ugliness" of certain 1990s district lines.

We will pay particular attention to several recent data-grounded assertions that have been used to provide support for normative claims about the lack of a continued need for the Act, or about the negative consequences of the current

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the first time.

[25] Republican Party of North Carolina v. Hunt, No. 94-1057, 1994 WL 265955, at *3 (4th Cir. June 17, 1994) (per curiam).

[26] 478 U.S. 109 (1986).

[27] *Bandemer*, 478 U.S. at 143. The majority also concluded that a "threshold showing of discriminatory vote dilution is required for a prima facia case of an equal protection violation." *Id.*

[28] The current negative reaction to the Act cannot be understood without taking into account constitutional and normative arguments about ideas concerning equality and competing individualistic and group-oriented conceptions of voting rights. For critics of the Act, such as George Will, the Act has come to embody an idea of tribalistic representation that is incompatible with a commitment to a color-blind society, and thus is incompatible with the "proper" interpretation of the Fourteenth Amendment. As George Will put it:

> The creation of "minority-majority" districts expresses the ideology of "identity politics": you are whatever your racial or ethnic group is. But that ideology, promulgated by political entrepreneurs with a stake in the racial and ethnic spoils system, is false regarding the facts of human differences, and bad as an aspiration and an exhortation.

George Will, *The Voting Rights Act at 30: Racial Gerrymandering is One Reason Newt Gingrich is Speaker*, NEWSWEEK, July 10, 1995, at 64. However, we will not devote much attention to the purely normative debate about voting rights in this paper.

implementation of the Act for minority interests. One of these assertions is that white voters have demonstrated a willingness to support suitable minority candidates; hence, the insistence on drawing minority districts is misguided. For example, Carol Swain, in a book published in 1993, observed that in 1991 forty percent of all black members of Congress were elected from districts that were not majority black.[29] Another assertion we will discuss is the argument that drawing minority districts is actually counterproductive to minority interests. We will examine the accuracy of these empirical claims, as well as others made by critics of the Act, and the ways in which these claims have been used to buttress the normative argument(s) for which each one has been used as a prop.

II. KEY VOTING RIGHTS CASES OF THE 1990S

A. Shaw v. Reno *and* Miller v. Johnson

The peculiar shapes of a number of majority-minority legislative districts (especially some of the majority black congressional districts drawn in the South) have triggered a public, scholarly, and legal backlash against the creation of convoluted majority-minority districts and, more generally, against the judicial and administrative implementation of the Act.

In *Shaw v. Reno*, the Court held that a districting plan will be deemed unconstitutional if the plaintiff shows that the plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."[30] The *Shaw* decision has led to a number of plaintiffs challenging the constitutionality

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[29] *See* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS 193 (1993) (discussing districts of newly elected black representatives to Congress). Swain noted further that black representatives elected in these non-black majority districts "have represented the interests of both blacks and whites," and far from relegating black interests to a secondary level of importance when compared to white policy preferences "seem to represent progressives of all races." *Id.* at 141.

[30] Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2828 (1993).

of majority-minority legislative districts based on the shape of the district.[31] This decision has also led to a greater willingness by jurisdictions covered under section 5 of the Act to challenge Justice Department section 5 preclearance denials on the grounds that no constitutional remedy was possible since any remedy plan would require oddly shaped districts.[32] Furthermore, the *Shaw* decision has fostered less willingness on the part of jurisdictions faced with section 2 lawsuits to agree to draw majority-minority districts as part of an out-of-court settlement, since defendant jurisdictions can take refuge in the claim that the remedial district(s) violated *Shaw*.[33]

Shaw presented a number of problems, the principal ones being: (1) the opinion was not clear as to how to determine compliance with the test for unconstitutional districting; (2) the decision was overly broad in that it converted a relatively minor problem—bizarrely shaped districts that reach out to pick up isolated black (or Hispanic) populations—into a matter of major constitutional substance by inventing a new constitutional test which all districts must satisfy; (3) *Shaw* was inconsistent in its treatment of district shape in that district lines that would be unproblematic if drawn to assure the reelection of a particular incumbent became impermissible for the much more commendable purpose of enhancing minority representation; and, (4) the Court majority displayed a blissful ignorance of the strength of barriers to minority electoral success from non-minority districts (an ignorance which leads them to ignore completely the probable implications of *Shaw* for diminished minority representation in Congress and state

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[31] *See, e.g.*, Pac for Middle Am. v. State Bd. of Elections, No. 95-C-827, 1995 WL 571887, at *1 (N.D. Ill. Sept. 22, 1995) (alleging General Assembly's redistricting plan did not reapportion districts corresponding to 1990 Census); *see also* Vera v. Richards, 861 F. Supp. 1304, 1309 (S.D. Tex. 1994) (questioning whether redistricting criteria other than race can explain congressional districts' boundaries). Through November 1995, six states have challenged congressional districts as violative of *Shaw*, and several states have already had districts struck down either by lower courts or, in Georgia's case, the Supreme Court. Miller v. Johnson, 115 S. Ct. 2475, 2494 (1995).

[32] The Court has also reiterated that a reapportionment plan may be unconstitutional, even though it satisfied § 5. *Shaw*, 113 S. Ct. at 2831.

[33] *Id.*

legislatures).[34]

1. Lack of Clearly Manageable Standards

There are dramatic differences in how lower courts have interpreted *Shaw*, suggesting that the opinion did not establish clearly manageable standards. For example, on remand the district court sustained the North Carolina 12th congressional district using ill-compactness simply as a flag for a potential violation.[35] The court asserted that once a presumption had been established that a majority-minority district would be needed to satisfy the anti-dilution standards of the Act, then the shape of a remedial district is entirely a matter for the legislature to decide.[36] In contrast, *Hays v. Louisiana*[37] and *Hays II*,[38] which both ruled that Louisiana's 4th congressional district was unconstitutional, treated the shape of the district as an overriding concern in its review of whether the plan's use of race was "narrowly tailored" to fulfill the "compelling government interest" requirement that *Shaw* established.[39] Indeed, *Hayes II* rejected the legislature's second congressional plan despite the fact that the legislature's second attempt was in a somewhat more aesthetically pleasing shape.[40]

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[34] *Id.* at 2816-33.

[35] Shaw v. Hunt, 861 F. Supp. 408, 494 (E.D.N.C. 1994). The court illustrated that terms like "compactness" were not "scientifically ascertainable." *Hunt*, 861 F. Supp. at 494. *But see* Romero v. City of Pomona, 883 F.2d 1418, 1424 (9th Cir. 1989) (stating geographical compactness included eligible minority voter population, rather than total minority population).

[36] *Hunt*, 861 F. Supp. at 439. Provided, of course, that the legislature created a plan that provided minorities with an equal opportunity to elect candidates of choice and did not submerge non-minority voting strength. *Id.* at 454.

[37] 839 F. Supp. 1188 (W.D. La. 1993), *vacated*, 114 S. Ct. 2713 (1994).

[38] 862 F. Supp. 119 (W.D. La. 1994), *vacated*, 115 S. Ct. 2431 (1995).

[39] *Hays II* specifically stated that "the bizarre and irregular shape of District Four raises the inference that the Louisiana Legislature classified its citizens along racial lines and segregated them into voting districts accordingly." *Hays II*, 862 F. Supp. at 121.

[40] *Id.* at 123. The district court stated that the legislature believed erroneously that the Act demanded the creation of a second majority-minority district. *Id.* To the contrary, the court stated that the Act forbade abridging the right to vote

Increasing the confusion surrounding the importance of shape was the fact that although shape appeared to be a key element of the *Shaw* opinion the Georgia congressional district that *Miller* struck down was not especially ill-compact compared even to other congressional districts in that state, and was quite compact compared to the North Carolina 12th congressional district.[41] Thus, *Miller* has done nothing to clarify how to administer the *Shaw* test.

2. *Jurisprudential Excessiveness*

Shaw was jurisprudentially excessive because it created a new constitutional violation[42] when it could have addressed the perceived problem, oddly shaped districts, in a more efficient and focused manner merely by correcting misinterpretations of section 2 (and section 5) of the Act. The Court could have achieved the same end with far less travail by simply choosing a different case to send a message to state legislatures (and to lower courts and the Department of Justice) about how to interpret the geographical compactness element of *Gingles*'s three-pronged test for section 2 vote dilution and/or the section 5 preclearance denial standard.[43]

To understand better how to address the problem of contorted districts, one must understand the source of the problem. Why did southern legislatures go to such extreme lengths to draw districts with black majorities, including a number of tortuously shaped ones? In our view, the simple answer was fear on the part of the legislators that a voting rights challenge or a preclearance denial would delay the implementation

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because of race or color. *Id.*

[41] Miller v. Johnson, 115 S. Ct. 2475, 2508-09 (1995). For a far more favorable view of the North Carolina 12th congressional district by an expert witness in Shaw v. Hunt, see J. Morgan Kousser, Shaw v. Reno *and the Real World of Redistricting and Representation*, 26 RUTGERS L.J. 625, 625-710 (1995) (discussing partisan warfare and redistricting in the 1990s).

[42] *See supra* note 14 and accompanying text.

[43] Thornburg v. Gingles, 478 U.S. 30, 50 (1986). The Court stated that the first element that a minority group must show was that "it is sufficiently large and geographically compact to constitute a majority in a single member district." *Gingles*, 478 U.S. at 50.

of the new plan and/or leave open the possibility that a court would completely redraw a plan with unforeseeable consequences for predominately Democratic incumbents. Changing perceptions of what the courts required interacted with the need of Democratically controlled southern legislatures to contend with a rising Republican tide, forcing plan drawers to new heights of cartographic creativity if they wished to hold on to the seats of existing Democratic incumbents while at the same time satisfying black aspirations (and perceived legal requirements) for more majority-minority seats.[44]

But what made the 1990s round of districting so different from that of the 1980s in terms of the expectations of legislatures about what types of plans would pass muster with the Department of Justice and with federal courts? Five factors were especially relevant: (1) the changed legal environment brought about by the 1982 amendments to section 2 of the Act and the way in which the Court interpreted the new section 2 language in *Thornburg v. Gingles*;[45] (2) a campaign directed by the (then) chief counsel for the Republican National Committee to get Republican legislators to cooperate with black and Hispanic legislators in proposing plans with as many majority-minority seats as possible, regardless of the shapes of the districts;[46] (3) a perception on the part of southern state

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[44] Moreover, southern black legislators, who are virtually all Democrats, may have been more reluctant in the 1990s than the earlier decades to trade off the goal of more black descriptive representation against the potential cost of net gains by Republicans. *See* Kimball Brace et al., *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 169, 170 (1987) (comparing black legislative gains in South to nationwide success of Republicans).

[45] Grofman, *Vince Lombardi*, *supra* note 8, at 1240. *Gingles* simplified the legal standards for vote dilution and sustained congressional authority to permit vote dilution to be determined on the basis of the effect of a plan regardless of the intent of the plan's framers. *Id.*; *see also* GROFMAN, MINORITY REPRESENTATION, *supra* note 6, at 61-81 (elaborating further on *Gingles* three-pronged test).

[46] Grofman, *Vince Lombardi*, *supra* note 8, at 1247-56. During the early phases of 1990s redistricting, Benjamin Ginsberg, Chief Counsel of the Republican National Committee, actively sought to organize Republican support for minority-preferred redistricting plans. *Id.* at 1249 n.47. The Republican National Committee and a foundation the Committee helped to establish provided monetary assistance and litigation aid to minority groups in a number of voting rights challeng-

legislatures that, with a Republican president, the Department of Justice would interpret section 5 of the Act so as to force southern legislatures to maximize the number of majority black districts;[47] (4) the desire of the civil rights bar to see the Act enforced to its fullest possible scope, coupled with the belief of many experienced voting rights litigators that district shape ought to be irrelevant to a voting rights claim; and, (5) the perception by southern legislators drawing plans in 1991 and 1992 that the remarkable success rates of section 2 districting challenges,[48] and the (then) perfect record of the Department of Justice in defending against section 5 declaratory judgments meant that it was almost impossible to defend successfully against a voting rights challenge.[49]

If the Court had recognized that beliefs about what the Act required drove the crafting of bizarrely shaped minority districts in the 1990s round of districting, then it could easily act to make it unlikely that tortuously shaped minority districts would be drawn in the next round of redistricting by simply reiterating and strengthening the geographic compactness standard laid down in *Gingles*.[50] There was no need for the Court to resort to creating a new constitutional violation to eliminate strangely shaped minority districts.

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es. *Id.* at 1249-50. The most cynical explanation for this support was to attribute to it the perceived political benefits it would have for Republicans (insofar as black and Hispanic majority districts "soak up" large numbers of Democrats, thus "whitening" or "bleaching" the remaining districts), making a Republican victory more likely in these districts. *Id.* at 1248.

[47] *Cf.* Grofman, *Vince Lombardi*, *supra* note 8, at 1243-47 (discussing Grofman's view of facts about Justice Department voting rights enforcement.)

[48] In eight states (the seven states of the deep South plus Texas), well over 90% of the voting rights cases decided between 1982 and 1990 were in favor of the plaintiffs. *See* QUIET REVOLUTION IN THE SOUTH, *supra* note 4, at 38-298 (examining voting rights cases in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia).

[49] Grofman, *Vince Lombardi*, *supra* note 8, at 1240-41. Moreover, as a result of 1980s and previous voting rights litigation, by 1990 the civil rights bar had built up a sizable corps of experienced litigants and knowledgeable expert witnesses. *See* Gregory A. Caldeira, *Litigation, Lobbying, and the Voting Rights Law*, *in* CONTROVERSIES IN MINORITY VOTING 230-60 (Bernard Grofman & Chandler Davidson eds., 1992) (explaining evolution of interest group litigation).

[50] *See supra* note 43 and accompanying text.

3. Inconsistent Treatment of the Importance of District Shape

If ill-compactness really is so troubling, why not attack that problem directly instead of making shape a problem only in conjunction with lines that have racial implications? Currently, the assertion seems peculiar that an "ugly" congressional district drawn to foster the reelection chances of a particular incumbent might be perfectly constitutional, but that same district drawn to remedy 100 years of black exclusion would not be constitutional. Furthermore, if the Court is to insist on a *Shaw*-like test for majority-minority districts, the test should be one that is compatible with the *Gingles* operative of section 2.[51] It would be absurd to prevent with a constitutional test what is a constitutionally permissible standard.[52]

4. Empirically Misguided

Shaw became empirically misguided in its implicit view that the country no longer needed race-conscious districting.[53]

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[51] Thornburg v. Gingles, 478 U.S. 30, 73 (1986). The Court stated that "[f]ocusing on the discriminatory intent of the voters, rather than the behavior of the voters, also asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations." *Gingles*, 478 U.S. at 73.

[52] In our view, the best way for the Court to operationalize *Shaw* is not via a mathematical measure of compactness. Rather, we might look at whether or not a district violates contiguity (since, arguably, contiguity is inseparable from the very concept of geographic districting), then we might look to see the extent to which the district satisfied what one of the present authors has called a "[re]cognizability test." Grofman, *Vince Lombardi*, *supra* note 8, at 1262-63. "Cognizability" referred to the ability of a legislator to define in commonsense terms and based on geographical referents the characteristics of his or her geographic constituency. *Id.* The appropriate test of [re]cognizability was not whether the voters knew the boundaries of the district in which they resided, but whether those boundaries were explained to them in simple commonsense terms. *Id.* "Recognizability" has not been the subject of prior case law, but one can identify egregious violations of the recognizability principle by making use of such standard criteria of districting as violations of natural geographic boundaries, grossly unnecessary splitting of local subunit boundaries, and sundering proximate and contiguous natural communities of interests. *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77, 77-184 (1985) (discussing various racial effects on districting models).

[53] Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2828 (1993). The majority

Legislatures have drawn many more majority black seats in the 1990s than ever before, especially in the South.[54] As a result, 1992 saw dramatic gains in black legislative representation in the South especially at the congressional level. For example, in the South, the number of black members of Congress went from 4 in 1990 to 17 in 1992 solely as a consequence of the increase in the number of black majority congressional districts (which increased from 4 to 18). Hispanics, also under the Act's protection, have made congressional and legislative gains as well, largely through the creation of districts with Hispanic majorities. As the work done by the present authors, along with co-author Wayne Arden,[55] has shown, black and Hispanic gains in representation in the 1990s, like minority legislative gains in the 1970s and 1980s,[56] were attributable almost entirely to the creation of majority black and Hispanic districts.[57]

Shaw was also misguided in its view that an analogy can be made between majority-minority districts and "racial apartheid."[58] In fact, these districts tend to be the most racially balanced districts in a state. Indeed, majority black state leg-

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stated that qualifying voters according to race undermined the integrity of our system of representative democracy. *Shaw*, 113 S. Ct. at 2828. Expanding this proposition further, the majority cited the fact that racial gerrymanders reinforced racial stereotypes, for elected officials came to believe that their candidacy reflected a particular group's interests and not his or her entire constituency. *Id.*

[54] Grofman, *Vince Lombardi*, *supra* note 8, at 1257.

[55] *See* Lisa Handley et al., *Electing Minority Preferred Candidates to Legislative Office: the Relationship between Minority Percentages in Districts and the Election of Minority Candidates*, 5 NAT'L POL. SCI. REV. (forthcoming 1996).

[56] *See* Richard Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1359-92 (1995) (discussing generally race and redistricting).

[57] While some of the gains in minority representation may well be lost as a result of *Shaw*, this need not be inevitable if the Court does not retreat from its resolve that race-conscious districting is permissible to remedy minority vote dilution, and continues to apply the *Gingles* test (as interpreted by pre-*LULAC* courts) as the standard for defining vote dilution under section 2. For further elaboration of this point, see Bernard Grofman, *The Supreme Court, Voting Rights and Minority Representation*, *in* AFFIRMATIVE ACTION AND RACIAL REPRESENTATION (A. Peacock ed., forthcoming 1996).

[58] Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993). After equating majority-minority districts with racial apartheid, the Court stated that a reapportionment plan could reinforce "impermissible racial stereotypes." *Shaw*, 113 S. Ct. at 2827.

islative and congressional districts that are overwhelming in their minority composition, with black percentages over 80 percent, have received little attention because these districts tend to be relatively compact because they encompass black population concentrations in highly segregated large cities.

Despite our concerns about *Shaw*, we would not want to overstate its importance. We believe that *Shaw* may be limited in its effects. First, in many instances, legislatures can redraw districts subject to *Shaw*-like challenges by employing a "liposuction" remedy; specifically, the legislature could redraw by removing many of the districts' more irregular aspects. This will often be possible without major drops in black voting strength because at least some of the irregularities in the shape of a particular majority-minority district is a reflection of concerns for protecting incumbents in other districts and cannot be characterized as racial in motivation. Second, *Shaw*-like challenges will not be that important in local districtings because with smaller-sized districts it is easier to draw reasonably compact lines that reflect communities of interest, racial and otherwise. Third, it may be possible for defenders of the districts to prevail on the merits by showing that the minority district was needed to remedy minority vote dilution and/or that the lines satisfied standard redistricting criteria to at least as great an extent as most other districts. Lastly, it is also useful to note that the confluence of factors that led to the creation of so many new (and sometimes tortuously shaped) majority black districts in the South over the past two decades will never again be repeated, and that, even more importantly, the potential no longer remains to create a substantial number of additional majority black congressional districts in the South because of the degree of geographic dispersion of the remaining pockets of southern black voters.[59]

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[59] *See* Bernard Grofman & Lisa Handley, *Black Representation: Making Sense of Electoral Geography at Different Levels of Government*, 14 LEGIS. STUD. Q. 265, 265-79 (1989) (elaborating on link between geographic dispersion and feasibility of creating majority-minority districts).

B. LULAC v. Clements

In *League of Latin American Citizens v. Clements*, the Fifth Circuit moved away from the straightforward question of whether or not minority-preferred candidates regularly lost because of white bloc voting into a consideration of whether or not other factors, such as straight party-line voting, could account for the racial differences in voting patterns.[60] *LULAC*, in shifting the focus to a determination of whether there are non-racial reasons for the observed racial differences in voting patterns, reintroduced considerations of intent into a section 2 vote dilution challenge.[61] The court shifted its focus despite the fact that the avowed aim of supporters of the 1982 amendments to section 2 of the Act was to provide a pure effects-based standard for the statute after the Court in *City of Mobile v. Bolden*[62] made purposeful discrimination a required element of unconstitutional vote dilution.[63]

In a number of recent cases outside the Fifth Circuit, experts for defendant jurisdictions have adopted the approach of defining racial polarization taken by the *LULAC* court.[64] These experts argued that even though there was compelling evidence that minority voters are much more likely to support minority candidates than are non-minority voters, and even though minority candidates regularly lost, this could not be characterized as racially polarized voting under the Act if the differences in support offered by minority and non-minority voters to minority-preferred candidates could be attributed to the correspondence between the party affiliation of these candidates and their supporters.[65]

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[60] *See supra* note 19 and accompanying text.

[61] League of United Latin Am. Citizens (LULAC) v. Clements, 999 F.2d 831, 849 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). Revisiting the question of intent, the court stated that Congress explicitly intended that proof of discriminatory intent was not necessary to establish a section 2 claim. *LULAC*, 999 F.2d at 849.

[62] 446 U.S. 55, 75 (1980).

[63] *Bolden*, 446 U.S. at 62. The Court ruled that a plaintiff could sustain a claim only by showing a discriminatory purpose. *Id.*

[64] *See, e.g.*, Sanchez v. Bond, 875 F.2d 1488, 1470 (10th Cir. 1989), *cert. denied*, 478 U.S. 937 (1990) (explaining that party affiliation was better indication of voter behavior than race).

[65] *Sanchez*, 875 F.2d at 1493. Although the defendant's expert testified that

The *LULAC* court's treatment of racially polarized voting was fundamentally flawed. The chief problem with this approach to polarized voting was that it brought intent into the analysis through the back door. Furthermore, in a jurisdiction like Texas, where minorities were predominantly affiliated with the Democratic party, it insidiously shifted the question from the level of minority success to the level of Democratic success.

1. Resurrection of Intent Standard

The *LULAC* decision took us away from the effects test standard enunciated in section 2 of the Act and operationalized in *Gingles*. Congress amended section 2 of the Act in 1982 specifically to eliminate any need to prove purposeful discrimination in a vote dilution case.[66] The 1982 language of section 2 reads (in part) as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .[67]

In *Gingles*, the Court identified a requisite level of racial bloc voting as one of the basic factors in the proof of minority vote dilution for an at-large or multimember district system under the 1982 language of section 2.[68] Writing for the Court, Justice Brennan stated, "[t]he purpose of inquiring into the existence of racially polarized voting was twofold: to ascertain

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party affiliation was the main factor in voting, the court was critical of his analysis. *Id.*

[66] S. REP. NO. 417, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. (96 Stat.) 204-14.

[67] 42 U.S.C. § 1973(a) (1988) (emphasis added).

[68] Thornburg v. Gingles, 478 U.S. 30, 55 (1986). The Court further explained, "[b]ecause . . . the extent of bloc voting necessary to demonstrate that a minority's ability to elect its preferred representatives is impaired varies according to several factual circumstances, the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district." *Gingles*, 478 U.S. at 55-56.

whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates."[69] These two inquiries accounted for two of the three elements of the *Gingles* three-pronged test. Comprising the third element of proof in the *Gingles* section 2 test was the requirement that a plaintiff show that the minority group was "sufficiently large and geographically compact to constitute a majority in a single-member district."[70]

The *LULAC* decision was incompatible with *Gingles* because it moved from a test for racially polarized voting based simply on the presence or absence of differences in the support levels of black and white (or Hispanic and non-Hispanic) voters vis a vis the minority candidate(s) of choice that *Gingles* specified to a test that required consideration of the factors that may have influenced voters to vote as they did.[71] Thus, the LULAC test became a question of whether or not the intent lying behind the decision of white/Anglo voters not to support minority-preferred candidates could be regarded as racial in motivation.

LULAC stood for the proposition that even if minority voters support the minority candidate in overwhelming numbers and non-minority voters oppose the minority candidate in

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[69] *Id.* at 56. Justice Brennan also wrote that the issue of "legally significant racially polarized voting" demanded discrete inquiries into voting practices. *Id.* According to Justice Brennan, if a plaintiff showed that a substantial number of minority voters typically supported the same candidates, then they would satisfy the "political cohesiveness" aspect of a vote dilution claim. *Id.* Satisfying the requisite level of "white bloc voting," a plaintiff could establish that the white vote would generally defeat the aggregate strength of minority support. *Id.*

[70] *Id.* at 50. Significantly, the Court illustrated, "[i]f [the district is not geographically compact], as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates." *Id.*

[71] League of Latin Am. Citizens (LULAC) v. Clements, 999 F.2d 831, 876 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). The court evaluated the proof of voter dilution on a "totality of the circumstances" basis. *LULAC*, 999 F.2d at 876. As a result of the court's approach, a plaintiff must meet a more substantial threshold at trial when creating a fact issue. *Id.* No less than the *Gingles* preconditions, a party must also show that "they do not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters." *Id.* at 849.

overwhelming numbers, and if one can demonstrate that minority voters supported the minority candidate not because he was black/Hispanic but because he was a Democrat, while nonminority voters opposed that candidate not because he was minority but because he was a Democrat (and not a Republican), then voting was not racially polarized. Writing for the majority, Judge Higginbotham explained that if partisan affiliation, not race, was responsible for the defeat of the minority preferred candidate there can be no finding of racial vote dilution.[72] Thus, it is in this fashion that *LULAC* sneaks an intent requirement back into section 2 jurisprudence.[73] In *Gingles*, the Court made clear that intent was to play no role in the examination of racially polarized voting by accepting the definition offered by plaintiffs' expert witness in that case (Grofman) that voting was polarized when black voters and white voters voted differently.[74] Footnote twenty-one of *Gingles* asserted

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[72] *Id.* at 880. The court's decision, focusing on the "totality of the circumstances," reflected that the elections involved no racial politics. *Id.*

[73] *Id.* The en banc majority in *LULAC* claimed that they were merely applying the standards for judging racially polarized voting laid down by the Court in Whitcomb v. Chavis, 403 U.S. 124 (1971). *LULAC*, 999 F.2d at 851. In *Whitcomb*, the Court refused to overturn an at-large plan in Marion County, Indiana as unconstitutional under the Fortson v. Dorsey, 379 U.S. 433 (1965), effects standard because the success of ghetto blacks could not be attributed to their race but rather to the overall success or failure of Democratic slates in the county. *Whitcomb*, 403 U.S. at 160. Buttressing their interpretation of *Whitcomb*, the *LULAC* majority cited Justice Marshall's dissent in *Mobile v. Bolden*:

> In Whitcomb v. Chavis we again repeated and applied the *Fortson* [effects] standard, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. The Court stressed that both Democratic and Republican Parties had nominated Negroes and several had been elected. Negro candidates lost only when their entire party slate went down to defeat.

LULAC, 999 F.2d at 853 (citing Mobile v. Bolder, 446 U.S. 55, 109 (1970) (Marshall, J., dissenting) (citations omitted)). However, even taking this analysis to be the correct reading of *Whitcomb*, the Court decided *Gingles* fifteen years later and this case therefore should define the governing standards.

[74] Thornburg v. Gingles, 478 U.S. 30, 53-54 (1986). The district court found "racially correlated voting" in the districts. *Gingles*, 478 U.S. at 53. Regarding this correlation, Grofman revealed the relationship between race and voting behavior was "statistically significant," an explanation which the Court accepted. *Id.* n.21.

that "racial polarization" can be established in terms of observed "correlations" between the racial composition of election districts and candidate choices in those units, at least insofar as a correlation between the race of the voter and the way in which the voter voted implies differences in the voting behavior of minority and non-minority voters.[75] This language was clearly incompatible with the test for bloc voting set forth by the *LULAC* majority.

The *LULAC* court, however, claimed that five Justices in *Gingles* endorsed its definition of "legally significant bloc voting." While Section IIIC of Justice Brennan's opinion in *Gingles* (in which he explicitly rejected the views of the *LULAC* majority about the legal test for racial bloc voting) was only a plurality opinion the quotations above[76] were not from Section IIIC, but from earlier parts of the opinion which a majority of the Justices, including Justice White, signed.

The *LULAC* court was, of course, correct in noting that Justice White strongly dissented from Section IIIC of Justice Brennan's opinion. But if one suggested that all five Justices who dissented from this section were of a single opinion regarding the definition of racially polarized, then the result would be misleading. Justice O'Connor's views (writing for herself and three other Justices) about how to define racial bloc voting were not synonymous with those Justice White expressed in his concurrence.[77] The critical quotation from Justice O'Connor's opinion in *Gingles* was as follows:

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, *I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may*

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[75] *Gingles*, 478 U.S. at 53 n.21.

[76] *See supra* notes 14, 30, 69 and accompanying text.

[77] *Gingles*, 478 U.S. at 83 (O'Connor, J., concurring). Of course, Justice O'Connor's opinion directly expressed her agreement with Justice White's demurral from Justice Brennan's view that the race of the candidate was always irrelevant in identifying racially polarized voting, but there were important differences and she partly sided with Justice Brennan on other points of dispute. *Id.* (O'Connor, J., concurring).

be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.

I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the Senate Report clearly states that one factor that could have probative value in Section 2 cases was 'whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.' The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. Such a rule would give no effect whatever to the Senate Report's repeated emphasis on 'intensive racial politics,' on 'racial political considerations,' and on whether 'racial politics . . . dominate the electoral process' as one aspect of the 'racial bloc voting' that Congress deemed relevant to showing a Section 2 violation.[78]

The *LULAC* court, however, quoted from the first part of the above section in an elliptical way, and prefaced the quota-

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[78] *Id.* at 101 (emphasis added) (citations omitted).

tion with language that we believe distorted its true meaning:

> Justice O'Connor joined Justice White in maintaining that evidence that white and minority voters generally supported different candidates did not constitute legally significant racial bloc voting where these patterns were attributable to partisan affiliation rather than the race of the candidate. She therefore rejected Justice Brennan's position that 'evidence that the divergent racial voting patterns may be explained in part *by causes other than race, such as an underlying divergence in the interests of minority and white voters* . . . can never affect the overall vote dilution inquiry.[79]

Judge Higginbotham's reporting of Justice O'Connor's concurrence (and his framing of quotations from it) suggested a greater degree of disagreement between her views and those of Justice Brennan than we believe was accurate. It is useful to remember that Justice O'Connor was agreeing with Justice Brennan when she said, "I agree that defendants *cannot* rebut this showing [of polarization] by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race."[80]

We view Justice O'Connor's central point in *Gingles* as an insistence on looking at the "totality of the circumstances" in judging vote dilution. In our view, Justice O'Connor separated the question of how to define and measure bloc voting, where she agreed with Justice Brennan, from the question of what evidence the Court can consider in the broader inquiry, in which she preferred to cast a wider net than Justice Brennan.[81] *Gingles*, in our view, stands for the premise that

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[79] League of United Latin Am. Citizens (LULAC) v. Clements, 999 F.2d 831, 856 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). The *LULAC* court emphasized the division between Justice Brennan's plurality opinion and Justices White's and O'Connor's concurrences. *LULAC*, 999 F.2d at 857. Specifically, all agreed that only "legally significant racial bloc voting" created a claim under section 2, but disagreement existed on the proof necessary to sustain a claim. *Id.*

[80] *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring) (emphasis added). The words "I agree," and "cannot rebut," as well as other phrases, were omitted in Judge Higginbotham's rendition of Justice O'Connor's concurrence. *LULAC*, 999 F.2d at 856.

[81] *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring). In contrast to Justice

racial polarization is a matter of differences, not of reasons for such differences—even though the reasons might play some role in a totality of the circumstances analysis of vote dilution. Contrary to Judge Higginbotham's contention, no language existed in Justice O'Connor's opinion to suggest that she would always see party-line voting that divided along racial fault lines as not constituting racial bloc voting in the sense of the Act, since in a jurisdiction where one party, that of the white majority, was dominant and voting was strictly along party lines, it would never be true that "another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections."[82]

The potential implications of Judge Higginbotham's views for the recasting of voting rights case law are considerable, in part for what the opinion says, but even more so for what the next step might be. The opinion confined itself to ruling that racial bloc voting was legally insignificant when one can attribute racial bloc voting to straight-ticket party-line voting. This view, in and of itself, threw down a challenge to previous voting rights decisions. While the vast majority of cases have been at the local level, and most of these involved nonpartisan contests, the most politically consequential section 2 challenges (those to congressional and legislative elections) have involved partisan elections. Blacks have been overwhelmingly Democrat in their party affiliation since 1964, and whites have become increasingly Republican.[83] Thus, separating out racial from partisan concerns will not be easy, and forcing plaintiffs to try to do so in order to succeed in proving a section 2 violation in situations involving partisan elections will make it much hard-

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Brennan, Justice O'Connor urged that "evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters" could sometimes affect the vote dilution inquiry. *Id.* (O'Connor, J., concurring).

[82] *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring).

[83] *See* EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 138-58 (1989) (discussing changes in partisan affiliation without critical elections). Significantly, the authors asserted that the Democrats' pro-civil rights platform was a major factor in this party polarization. *Id.* at 150-51.

er for plaintiffs to prevail in such challenges, even in situations where minority exclusion was total.

But Judge Higginbotham's opinion has even more serious potential implications which apply to all voting rights cases, and not just to those involving partisan elections. While the *LULAC* majority refused to express a view on "whether *defendants* may attempt to prove that losses by minority-preferred candidates are attributable to non-racial causes other than partisan affiliation,"[84] it did assert that:

> Factors that might legitimately lead white voters to withhold support from particular minority candidates include, for example, limited campaign funds, inexperience, or a reputation besmirched by scandal. Because these additional factors map only imperfectly onto partisan affiliation, detailed multivariate analysis might then be the evidence of choice.[85]

Although Judge Higginbotham then proceeded to note that reasons existed why multivariate analysis would impose unfair burdens on plaintiffs, he concluded that "this argument [for multivariate analysis] possesses considerable force."[86] If future courts accept Judge Higginbotham's suggestion that multivariate methods are required in a racial bloc voting analysis, then the courts will be in for a statistical nightmare and plaintiffs will be in a legal context where proving racial vote dilution will become virtually impossible. Because one of the present authors had previously written extensively about the pitfalls of multivariate analyses after Judge Higginbotham first expressed his preferences for multivariate bloc voting analysis in his special concurrence in *Jones v. City of Lubbock*[87] ten years ago,[88] we will not elaborate further on that point here.[89]

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[84] League of United Latin Am. Citizens (LULAC) v. Clements, 999 F.2d 831, 860 n.27 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

[85] *LULAC*, 888 F.2d at 859. Judge Higginbotham further explained that unless courts made this additional inquiry "courts that confine their scrutiny to partisan voting might well find racial bloc voting in circumstances where the losses of minority-preferred candidates were actually attributable to causes other than race. *Id.* This result, it is urged, might unfairly tip the scales in favor of liability." *Id.* at 859-60.

[86] *Id.* at 860.

[87] 730 F.2d 233, 234-36 (5th Cir. 1984) (Higginbotham, J., concurring).

[88] The Eleventh Circuit cited Judge Higginbotham's views from *Jones* favor-

2. *Shift in Focus from Success of Minority-preferred Candidates to Partisan Success*

According to Judge Higginbotham in *LULAC*, the appropriate question was not whether minority candidates win as often as non-minority candidates but rather, did minority candidates who ran as Republicans win as often as Republican candidates who were not minority members and, alternatively, did minority candidates who ran as Democrats win as often as Democratic candidates who were not minority members. The claim in *LULAC* was that while minority candidates tended to lose the loss rates of minority candidates were no greater than for non-minority candidates of the same party.[90] However, even if one was to accept the need to control a party in assessing minority electoral success in general elections in the fashion proposed by the *LULAC* majority, it still did not follow from the evidence considered by the *LULAC* court that voting in Texas judicial contests was not racially polarized.

But if one observed that white/Anglo voters were no more likely to vote against Democrats in general elections who were minority members than Democrats who were white, does this mean that racial differences in voting had been "explained away" by differences in partisan attachments/loyalties? The answer to that question is no. Racial differences in partisanship were explained in part by the race-relevant differences in

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ably in NAACP v. City of Opelika, 748 F.2d 1473, 1484 (11th Cir. 1984), and in McCord v. City of Fort Lauderdale, 787 F.2d 1528, 1532-33 (11th Cir. 1986).

[89] In 1991, one of the present authors wrote that multivariate bloc voting was legally dead. *See* Bernard Grofman, *Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, 72 SOC. SCI. Q. 826, 832 (1991) (arguing that multivariate regression was inaccurate about racial bloc voting and confused courts); *see also* Bernard Grofman, *Straw Men and Stray Bullets: A Reply to Bullock*, 72 SOC. SCI. Q. 840, 842 (1991) (urging use of bivariate descriptive statistics instead of complex multivariate analyses).

[90] *LULAC*, 999 F.2d at 865-66. The Court stated: "The black preferred candidate was always the Democratic candidate, while the majority of white voters always supported the Republican candidate . . . . The race of the candidate did not affect the pattern. White voters' support for black Republican candidates was equal to or greater than their support for white Republicans." *Id.*

the policy positions taken by the political parties.

Judge Higginbotham cavalierly dismissed the importance of this point:

> Plaintiffs contend that the Democratic party better represents the political views of black voters in Dallas County. This is doubtlessly the view of black voters, but it is not relevant to whether the minority preferred candidate is defeated on account of race. To the extent that candidates preferred by black voters are consistently defeated because of their substantive political positions, they are the casualties of interest group politics, not racial considerations. This is not the harm against which Section 2 protects. Section 2 protects black voters against defeat on account of race or color, not on account of political platform.[91]

According to this view, if whites hostile to black interests form a political party, as long as that party ran a handful of candidates with black faces and its voters supported those candidates to the same degree as the party's other candidates race was not implicated. There was no need to turn to such an extreme case to see the difficulties with the above argument. It can readily be shown that the affiliations of white voters and black voters in the South have fluctuated directly with the nature of the racial policies espoused by the Democratic and Republican parties.[92] Today, the two major parties clearly stand for very different positions with respect to civil rights, and black voters support the Democratic party in overwhelming percentages, while the majority of white voters support the Republican party.[93] Moreover, the political affiliations of white voters in the South can be directly related to the racial context in which they find themselves, with whites in the most heavily black areas having deserted the Democratic party almost en-

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[91] *LULAC*, 999 F.2d at 879.

[92] *See* CARMINES & STIMSON, *supra* note 83, at 46. Starting with Goldwater's presidential candidacy, which garnished only 10 percent of the black vote, blacks overwhelmingly realigned themselves with the Democratic party. *Id.*

[93] *See* CARMINES & STIMSON, *supra* note 83, at 115-37. The writers argued that race was central to belief structuring in presidential elections. *Id.* at 126. For instance, one can witness this belief structuring in the "liberal/conservative dimension" in the general electorate. *Id.* at 132.

tirely.[94] Thus, to say that party-line voting is interest group politics is to miss the point that the Act was intended to protect African-Americans and other racial/ethnic minorities from being put in the position of permanent minorities by particular electoral arrangements that would submerge their voting strength.

3. *Focus on Race of Officeholder Rather Than Dilution of Minority Votes*

LULAC treated an inquiry into dilution of minority voting rights at least in part as if it were an inquiry into employment discrimination against minority officeholders. According to Judge Higginbotham:

> Undisputed evidence shows that in all of the counties, the percentage of minority lawyers was much smaller than the percentage of minority voters. In fact, minority lawyers disproportionately serve as judges, when their percentage among all eligible lawyers is considered . . . .[95]

> The absence of eligible candidates went a long way in explaining the absence of minority judges. Plaintiffs could not emphasize the scarcity of successful minority candidates to support the inference of dilution and simultaneously urged that the number of minorities eligible to run is not relevant.[96]

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[94] *See* Bernard Grofman & Lisa Handley, *Racial Context, the 1968 Wallace Vote, and Southern Presidential Dealignment: Evidence from North Carolina and Elsewhere*, *in* SPATIAL AND CONTEXTUAL MODELS IN POLITICAL RESEARCH 151-62 (Monroe Eagles ed., 1995) [hereinafter Grofman, *Wallace Vote*] (discussing 1972 presidential campaign and black vote). Grofman wrote that the Wallace vote began a migration of white voters from the Democratic to the Republican party. *Id.* at 152.

[95] *LULAC*, 999 F.2d at 865. The court continued to explain, "we have refused 'to preclude vote dilution claims where few or no [minority] candidates have sought offices in the challenged electoral system.'" *Id.* The court stated that "the cold reality is that few minority citizens can run for and be elected to judicial office." *Id.*

[96] *Id.* at 865-66. The record revealed that during the 1980s the percentage of minority judges was greater than that of minority lawyers who could run for district judge. *Id.* at 865. Further, counties which contained a small number of

Contrary to the implicit arguments in *LULAC*, the group whose rights the Act was intended to protect was not the set of possible minority officeholders, but rather the set of minority voters whose votes may be diluted. Blacks qua blacks (or Hispanics qua Hispanics) have no right to office; the right that the Fourteenth Amendment implicated was that no group had its votes minimized or canceled out. It was particularly ironic that the *LULAC* majority, some of whose members were hostile to the Act because it imposed color-conscious remedies, interpreted the Fourteenth Amendment in the voting rights context as the equivalent of a racial spoils system requiring government jobs for people of a given race, such that if enough of them had such jobs then they could have sustained no discrimination claim.[97]

The right that *LULAC* specifically implicated was the right of voters to be provided a method that offered minority and non-minority voters an equal opportunity to "participate in the political process and elect candidates of choice" in judicial elections.[98] It was not the right of black lawyers to have jobs as judges in proportion to their numbers among the pool of eligible lawyers. The size of the pool of minority lawyers, and whether or not black lawyers were over-represented as judges (indeed, even a finding that every black lawyer in Texas was already a judge), should have been completely irrelevant to the question of whether the plaintiffs could have sustained a voting rights dilution claim against a challenge to at-large judicial elections.[99]

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minority judges had a correspondingly low number of minority lawyers eligible to run for the judiciary. *Id.* at 866. Evaluating this data, the court concluded that a plaintiff could not argue the "sincerity" of minority candidates in the same context as vote dilution at the same time stating that the number of minorities was insignificant. *Id.*

[97] As the *LULAC* majority stated, "[t]he Voting Rights Act responds to practices that impact *voting*: it is not a panacea addressing social deficiencies." *Id.* at 866.

[98] *Id.* at 910 n.9 (King, J., dissenting) (quoting League of United Latin Am. Citizens (LULAC III) v. Clements, 986 F.2d 728, 812 n.59 (5th Cir. 1993)).

[99] However, in fairness to the *LULAC* court, we should also note that Judge Higginbotham's opinion was quite careful to distinguish in each county the number of black judges elected with white support from the number of black judges

C. Presley v. Etowah County

In *Presley v. Etowah County Commission*, the Court rejected a finding by the Department of Justice that a change in the allocation of responsibilities in Alabama county commissions was a change subject to section 5 preclearance.[100] In one of the counties, the reallocation of responsibilities followed the election of an African-American to office for the first time,[101] thus strongly suggesting a racial motivation for the change. Nonetheless, the Court held that the Act simply did not apply to the type of changes at issue.[102]

What made *Presley* a particularly troubling decision for the civil rights community was that it disregarded the fact that the Department of Justice had for nearly two decades reviewed similar intra-governmental transfers of authority in covered jurisdictions under its section 5 authority and had, in fact, refused to preclear a number of such transfers.[103] Furthermore, *Presley* disregarded federal court decisions sustaining the Department of Justice's authority to review such changes.[104]

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elected with black support, and was thus faithful to the focus in *Gingles* (and section 2 of the Act) on the ability to elect "candidates of choice." *Id.* at 877-93. It used the success of black Republican judges merely as evidence for the claim that partisanship was more important than race in determining voting patterns. *Id.*

[100] Presley v. Etowah County Comm'n, 502 U.S. 491, 508-10 (1972). In one jurisdiction, the change removed fiscal authority from individual council members and placed the authority in the hands of the council as a whole, while in another county the change involved delegation of full authority to the hands of an administrative officer who reported to the council as a whole. *Presley*, 502 U.S. at 495-97.

[101] *Id.* at 496-97. The African-American was elected to the council following the adoption of single-member districts created pursuant to a settlement decree in a voting rights challenge levied against the county. *Id.* at 496.

[102] *Id.* at 509. The Court concluded that the Act was limited to changes "with respect to voting" and was not intended to be applicable to changes "with respect to governance." *Id.* at 510.

[103] *Id.* at 511-12 (Stevens, J., dissenting). For a listing of similar transfers of authority objected to by the Department of Justice, see *id.* at 512 n.3 (Stevens, J., dissenting).

[104] *Id.* at 511-12 (Stevens, J., dissenting). For a listing of federal court decisions agreeing with the Department of Justice interpretation that such changes were subject to review, see *id.* n.28 (Stevens, J., dissenting).

Although the *Presley* decision was not as alarming as the decisions previously discussed,[105] cause for concern still remains. In dismissing the long-standing views of the Attorney General as to how the Court should interpret section 5 language, the Court asserted that the Department's interpretation was, on its face, contrary to the "unambiguous" meaning of the statutory language[106] and thus unworthy of deference under the deference to agency doctrine established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[107] It strains credibility to call a statute "unambiguous" when both Republican and Democratic Assistant Attorney Generals for Civil Rights (and some district courts) had for nearly two decades interpreted the statute in a manner directly opposite to the interpretation proposed by the *Presley* majority.[108]

We were also concerned because the *Presley* majority took the Department of Justice to task for having not proposed a "workable standard" to define which internal legislative changes should be subject to preclearance.[109] Finally, we were wor-

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[105] We believe that the *Presley* majority's opinion that the language of the Act did not cover changes in *internal* legislative procedures, was not an unreasonable one from the perspective of the statute's "clear meaning." *Presley*, 502 U.S. at 510. For instance, the Court stated that the Act was not an "all-purpose discrimination statute." *Id.* at 509. Thus, changes must correlate to voting rights themselves. *Id.* at 510.

[106] *Id.* at 509.

[107] 467 U.S. 837, 842-844 (1984). The Court has long recognized that an executive department's construction of a statutory scheme which it was authorized to administer should be given considerable weight. *Chevron U.S.A., Inc.*, 467 U.S. at 844.

[108] As evidenced by their concurring opinions in Hall v. Holder, 114 S. Ct. 2581, 2591-2624 (1994), Justices Scalia and Thomas, both advocates of "plain meaning" tests for statutory construction, were nonetheless capable of some flights of fancy in reading the language of the Act to mean what they thought it ought to mean. In *Holder*, they asserted that the Act did not cover election practices such as districting rules. *Holder*, 114 S. Ct. at 2583, 2602-03. Even if this were true of the 1965 Act, it was certainly not true of the Act as amended in 1982. *Id.* at 2606. Amended section 2 of the Act referred to voters having an equal opportunity "to participate in the electoral process and elect candidates of choice." *Id.* at 2608. Section 2 was meant to reaffirm earlier 14th and 15th Amendment court cases such as Fortson v. Dorsey, 379 U.S. 433, *cert. denied*, 379 U.S. 998 (1965), and White v. Register, 412 U.S. 755 (1973), both dealing specifically with vote dilution in multimember district elections. *Id.* at 2606 n.22.

[109] *Presley*, 502 U.S. at 504.

ried that the *Presley* decision would encourage legislatures, county boards, and city councils, in covered jurisdictions to make internal changes in authority with a discriminatory purpose and/or effect now that such changes were protected from Department of Justice preclearance scrutiny.[110]

D. Republican Party of North Carolina v. Hunt

Republican Party of North Carolina v. Hunt was a landmark decision because it marked the first time that a court struck down any districting plan as an unconstitutional partisan gerrymander.[111] In *Davis v. Bandemer*, the Court held political gerrymandering to be justiciable in principal, but found that the legislative plans under challenge were not egregious enough to hold unconstitutional.[112] Thus, prior to *Republican Party v. Hunt*, many scholars (the present authors included) had concluded that *Bandemer* was, for all practical purposes, a dead letter.[113]

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[110] In this context, one should note that the most egregious change made by the Etowah County Commission's white majority (by a 4 to 2 vote, with the two new African-American commissioners in opposition) was one vesting all responsibilities for road maintenance in the hands of the incumbent (white) commissioners. *Id.* at 503. That change was in fact held to require preclearance by the district court—a decision not appealed to the Supreme Court, and thus not one on which they pronounced. *Id.* at 504. In our view, the *Presley* majority would have had a hard time treating such a change as requiring preclearance, however, given their arguments about how people should interpret the statutory language.

There was evidence that Etowah County was not unique in adopting devices that operated (and were almost certainly intended to operate) to minimize or to cancel out the effective influence of newly elected minority officials. *See* Susan Feeney & Steve McGonigle, *Voting Rights: The Next Generation*, DALLAS MORNING NEWS, Aug. 16, 1994, at A1 (discussing harassment of minority officials in Mississippi).

[111] Republican Party of North Carolina v. Hunt, 841 F. Supp. 722, 733 (E.D.N.C. 1994), *aff'd as modified*, Republican Party of North Carolina v. North Carolina State Bd. of Elections, No. 94-1057, 1994 WL 263955 (4th Cir. June 17, 1994) (per curiam). The court held that the plaintiffs made a sufficient showing that the current electoral process caused them harm. *Hunt*, 841 F. Supp. at 733.

[112] Davis v. Bandemer, 478 U.S. 109, 143 (1986). The Court stated that a minimum showing of "discriminatory vote dilution is required for a prima facie case of an equal protection violation." *Davis*, 478 U.S. at 143.

[113] *See generally* Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to*

In *Hunt*, the plaintiffs challenged the at-large election plan for state superior court judges in North Carolina as a partisan gerrymander.[114] The first time the district court considered the suit, it simply dismissed the challenge without trial on the grounds that the plaintiffs had presented no constitutional claim under the test laid down in *Bandemer*.[115] On appeal, the Fourth Circuit reversed the lower court on the question of whether or not the plaintiffs had stated a constitutional claim, and remanded the case.[116] In its decision, the Fourth Circuit provided guidelines to the lower court for determining if unconstitutional partisan vote dilution was present.[117] These guidelines were modifications of the *Gingles* three-pronged test for racial vote dilution, revised to make them applicable to a partisan vote dilution context.[118] On remand, the plaintiffs won a unanimous decision from the three-judge panel,[119] and the Fourth Circuit declined to stay the order imposing a district-based remedy. However, this case is now (January 1996) back on remand and its fate uncertain.

Even if the present opinion survives, it us very difficult to project the implications of this North Carolina case to other

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Partisan Gerrymandering, 21 STETSON L. REV. 733, 816-17 (1992) (discussing Davis v. Bandemer, 478 U.S. 109 (1986), and its impact).

[114] *Hunt*, 841 F. Supp. at 723. Specifically, the plaintiffs alleged that the electoral process denied the franchise to Republican voters, violating the Fourteenth and First Amendments. *Id.*

[115] *Id.* The district court determined that the complaint raised a non-justiciable political question and thus dismissed the action. *Id.*

[116] *Republican Party v. Martin*, 980 F.2d 943, 961 (4th Cir. 1992) *cited in Hunt*, 841 F. Supp. at 724-25. The Fourth Circuit found that a viable, justiciable Equal Protection claim of vote dilution was brought about by political gerrymandering. *Martin*, 980 F.2d at 961, *cited in Hunt*, 841 F. Supp. at 724-25.

[117] *Martin*, 980 F.2d at 955. The court summarized the elements of a vote dilution claim: First, a plaintiff must allege intentional discrimination against a political group, and this effect must be greater than *de minimis*. *Id.* Second, the plaintiff must allege a history of disproportionate effects "that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.*

[118] The court opinion drew in part on ideas proposed by one of the present authors. *See* Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*, *in* POLITICAL GERRYMANDERING AND THE COURTS 29-63 (Bernard Grofman ed., 1990) (questioning partisan gerrymandering and federal district court interpretations of legislative plans).

[119] *Hunt*, 841 F. Supp. at 733.

partisan gerrymandering challenges that involved other types of elections or less unique evidentiary records. Because the plaintiffs challenged partisan judicial elections in this case, it was difficult to determine how—or even if—the same standards would apply to non-partisan elections, or to non-judicial elections. Furthermore, the plan under challenge involved a statewide at-large election and therefore the test was one of vote dilution by submergence. The court did not clarify how it could modify the test to apply to single-member districts, where the issue was vote dilution through dispersal or concentration. Of course, the evolution of voting rights case law as it moved from the context of at-large or multimember district elections (the setting in *Gingles*) to the context of single-member districts (in cases such as *Jeffers v. Clinton*[120]) did suggest some highly probable directions.[121] The Fourth Circuit, in particular, might be inclined to draw ideas from the racial vote dilution literature because it had already borrowed from tests which other racial cases developed.

The evidentiary record in *Hunt* was unusual. First, until 1994, Republicans had been almost totally excluded from superior court elected judgeships (the sole exception being one Republican judge who served between 1988 and 1990).[122] In contrast, Republican candidates had achieved modest but consistent successes in elections to the state's district court elections which occurred at the district level.[123] Second, Hunt was also an unusual case for an extensive record of superior court judgeship election results was available for the court to consider. Between the period when the plaintiffs first filed the lawsuit

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[120] 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1990).

[121] *See, e.g.*, Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J.L. & POL. 345, 345-403 (1992) (discussing legal standards for single- and multimember districting plans). The authors illustrated that a greater number of cases existed challenging multimember plans rather than single-member plans. *Id.* at 348.

[122] *Hunt*, 841 F. Supp. at 726. The court specifically noted that Republicans might have fared better in these elections if they were conducted on a districtwide basis. *Id.*

[123] *Id.* The court stated, "[b]etween 1968 and the inception of this lawsuit [1994], ten Republicans ran for resident superior court judgeships. . . ." *Id.*

and when the circuit court panel remanded it to the trial court, six years had elapsed.[124] Thus, the trial court had before it not only expert witness predictions of probable results for superior court elections but *actual* results for 60 percent of the ten year redistricting period, which showed a continuing pattern of almost total Republican exclusion in which the Republicans did not repeat their success of 1988 in either of the two subsequent elections.[125]

How courts will respond to records of partisan successes and failures that are not as one-sided or to situations in which the evidence is more disputable as to the predictability of partisan voting patterns presently remains unclear. Moreover, the Republican landslide of 1994 may have an impact on partisan gerrymandering claims because it illustrated the unpredictability of political fortunes and the impossibility of projecting with any accuracy the decade-long impact of any districting scheme. At this point, one cannot discern whether the North Carolina case will become a harbinger of other successful partisan gerrymandering challenges, or a unique instance, or be reversed.

III. Facts and Values in Voting Rights Jurisprudence

As the discussion of the previous cases indicated, with the possible exception of protecting Republican voters in North Carolina, the current climate toward extending and even protecting existing minority voting rights is hostile. The Court has demonstrated an unwillingness to protect minority gains in voting rights, and many interested scholars and media commentators have been very vocal in their opposition to what they perceived as unfair minority voters' advantages. The criticism has focused on the creation of convoluted majority-minority districts as well as the judicial and administrative implementation of the Act.[126] The tortuous shape of some of these

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[124] *Id.* at 727. This case took a long time to be resolved in part because the district court first dismissed the case. *Id.* at 723.

[125] *Id.* at 726. Specifically, the plaintiffs argued that the present electoral system diluted Republican voting strength, ensuring Democrats' dominance in future superior court elections. *Id.*

[126] *See* John Fund, *Political Pornography*, WALL ST. J., Sept. 9, 1991 at A10.

districts permitted conservatives who opposed the Act's vigorous implementation to pose as defenders of "good government." We believe that the critics were mistaken in much of their criticisms of majority-minority districts, but we close this section with a discussion of the long-term consequences of the Act in general. In conclusion, we determine that the Act has had some important unintentional consequences, particularly for the Democratic party in the South.

A. Forced Adoption of Contorted Minority Districts

The Act granted extraordinary power to the Department of Justice.[127] Since the inception of the Act, debates among scholars have rendered little agreement concerning the Justice Department's role in enforcing the Act; writing about the Act's enforcement in the 1970s and 1980s, liberal critics of the Justice Department's administration of section 5 made such claims as "negotiated compliance" between the Justice Department and covered jurisdictions led the Justice Department to defer unduly to local authorities at the expense of minority voting rights.[128] In remarkable contrast, conservative critics such as

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Wall Street Journal editorial page writer John Fund used the term "political pornography" to refer to districts such as the 12th congressional district in North Carolina, which stretches some 200 miles in a snakelike fashion across the state. *Id.*

[127] For instance, under section 5 of the Act, the Justice Department has direct authority over local and state statutes and administrative procedures concerned with "any voting qualification or prerequisite to voting, or standard, practice, or procedures with respect to voting. . . ." Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1988). The section 5 preclearance provisions put the burden on covered jurisdictions to demonstrate that changes do not have discriminatory effects or purpose. *See, e.g.*, Georgia v. United States, 411 U.S. 526, 537 (1973) (declaring that section 5 shifts burden of proof). Thus, the usual "innocent until proven guilty" standard was seemingly inverted. This remarkable tilt in federal state relations has been likened to a "second Reconstruction" by both proponents and opponents of the Act. *See, e.g.*, J. Morgan Kouser, *The Undermining of the First Reconstruction: Lessons for the Second, in* MINORITY VOTE DILUTION 27-46 (Chandler Davidson ed., 1984) (defining four stages in post-Reconstruction Voting rights).

[128] HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 194-95 (1982). Ball illustrated that the Justice Department did not deal "positively" with section 5. *Id.* at 194. For instance, Lyndon

Abigail Thernstrom contended that in the 1980s the Justice Department sometimes displayed a "get-the-racist-bastards" approach in its review of preclearance submissions that was inappropriate to its quasi-judicial role.[129]

The role of the Justice Department in voting rights enforcement in the 1990s was equally controversial. For example, in discussing *Miller v. Johnson*, George Will, in an editorial that appeared in *Newsweek*, wrote that "[u]nder pressure from the Justice Department, which was supporting the ACLU's 'Max-Black' plan to produce a third black majority [congressional] district, Georgia's legislature subordinated to racial considerations such traditional race-neutral districting principles as compactness, contiguity, and respect for political divisions and communities defined by actual shared interests."[130] In *Miller v. Johnson*, Justice Kennedy's majority opinion decried the Justice Department's use of its preclearance authority with regard to congressional districting in Georgia: "In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld."[131] Later in the opinion, Justice Kennedy further explained: "[i]t takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."[132]

Although it was true that the Department of Justice used its preclearance denial threat to compel the creation of many of the new majority-minority districts drawn in covered jurisdic-

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Johnson was not interested in implementing section 5 and thus did not pursue the Justice Department to enforce its provisions. *Id.* at 195. Further, Richard Nixon had a "southern strategy" not to enforce section 5. *Id.*

[129] Thernstrom, *supra* note 9, at 168.

[130] Will, *supra* note 28, at 64. Will went on to remark rhetorically: "Makes you wonder why it is called [j]ustice." *Id.*

[131] Miller v. Johnson, 115 S. Ct. 2475, 2493 (1995).

[132] *Miller*, 115 S. Ct. at 2494. Justice Kennedy also stated, "[o]nly if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race." *Id.*

tions,[133] the Justice Department never suggested specific district configurations, or even specific district locations. In fact, in North Carolina, the Justice Department actually suggested that the legislature draw an additional minority district in one region of the state, but the state chose to draw the district in another region entirely and this plan was precleared. Furthermore, the shape of the North Carolina 12th congressional district was as much a product of protecting incumbent representatives as it was the result of creating a district with a majority black population. In Texas, evidence that the parties presented to the district court made it quite clear that the minority congressional districts in Houston and Dallas have the contorted shapes that they do in order to protect incumbents, and that more compact minority districts, with higher concentrations of minority voters, were possible.[134]

B. Unwarranted Assumptions About Shared Political Interests

In *Shaw v. Reno*, Justice O'Connor opined that non-compact majority-minority districts reinforce the stereotype that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[135] Similarly, in *Miller v. Johnson*, Justice Kennedy rejected the Georgia legislature's "offensive and demeaning assumption" that those of a given race have similar interests.[136]

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[133] Southern legislators drawing districts in the 1990s were well aware of the remarkable success rate enjoyed by plaintiffs in section 2 challenges and the then perfect record of the Justice Department in defending against section 5 declaratory judgments. *See* Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH 21-37 (Chandler Davidson & Bernard Grofman eds., 1994) (discussing vote dilution and creation of majority-minority districts).

[134] Vera v. Richards, 861 F. Supp. 1304, 1321-22 (S.D. Tex. 1994). An expert witness testified to this fact at trial. *Vera*, 861 F. Supp. at 1322.

[135] Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993). The Court called these "impermissible racial stereotypes." *Shaw*, 113 S. Ct. at 2827.

[136] *Miller*, 115 S. Ct. at 2486. He also stated that these types of race based assumptions caused all of society harm. *Id.*

George Will emphasized what he saw as a vital distinction between "somewhat trimming a district's lines to conform to a compact racial or ethnic community," on the one hand, and drawing race-driven lines to define what he calls "an illusory political community that the 'organic' life of society has not created," on the other.[137] The view that race-derived commonalities were unrelated to the organic life of a society unless they had perfectly neat geographic boundaries can be characterized as naive at best, and disingenuous at worst. Are not the commonalities caused by the legacy of racism associated with centuries of slavery and Jim Crow law, as "organic" a construct as anything about which Edmund Burke might have discussed?[138]

Neither of the majority opinions in *Shaw* or *Miller* or George Will's articles reviewed any empirical evidence about the degree to which blacks see themselves as having common interests. In fact, the overwhelming evidence on patterns of racially polarized voting, along with the widening racial cleavage in partisan voting patterns in the South, made the assumption that blacks have similar political interests a realistic one, however unpalatable that may be to those who would wish to see the U.S. as having passed the point where race-conscious remedies are necessary to solve race-rooted problems. Indeed, writing in the minority in *Miller v. Johnson*, Justice Ginsburg, joined by Justices Steven, Breyer and Souter, approvingly cited a number of studies by social scientists which discussed the continuing significance of racial and ethnic divisions in American life.[139] Although these references were in many instances more than twenty years old, more recent works make the same point. For example, Michael Dawson's recently published book

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[137] Will, *supra* note 102, at 64.

[138] If blacks can be said to be unified only if they live together, if some congressional districts include multiple black ghettoes and not just one, then why does this matter? *See generally* DOUGLAS S. MASSEY & NANCY A. DEWTON, AMERICAN APARTHEID 67-74 (1993) (discussing suburbinization and segregation). In our view, the geography of race can be expected to resemble a black and white checkboard built up of racially homogeneous squares, albeit squares of different sizes. If blacks do see themselves as having interests in common, why should not more than one of the squares of a given color on the checkerboard be joined?

[139] *Miller*, 115 S. Ct. at 2505 (Ginsberg, J., dissenting).

emphasized that for blacks race was more important than class or other factors in defining self-identity or when someone defined it for another.[140] If we looked at the similarities between white and black attitudes on a large variety of issues, from foreign policy to abortion, it would be possible to argue that blacks and whites were really not that different in attitudes. But such a calculation would be quite misleading about things that mattered most. When it came to attitudes and beliefs linked to race, the empirical evidence was overwhelming that the gap between whites and blacks remained huge. Morgan Kousser, an historian noted for his work on southern politics and minority voting rights, summarized the evidence as follows:

> [W]hites and blacks see entirely different worlds. In the white view, there is little remaining prejudice or public or private discrimination, and there is consequently little need for government programs to do something about it. In the black view, prejudice and discrimination are pervasive, and government at all levels should act to remedy this serious plight.[141]

Creating majority-minority districts guarantees that minority voters will have the opportunity to elect candidates that will represent their interests. These districts are not drawn to guarantee that minorities be elected to office, however. These districts preclude no one running for office because of race or ethnicity, and many majority-minority districts have in fact elected whites to office.[142] Nonetheless, given the history of

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[140] *See* MICHAEL DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 130-58 (1994) (examining blacks' voting decisions from 1964 to 1990s). Dawson showed that blacks voted with consistent solidarity, especially in mayoral elections and in Jesse Jackson's 1988 presidential campaign. *Id.* at 130.

[141] J. Morgan Kousser, Shaw v. Reno and the Real World of Redistricting and Representation (Feb. 9, 1995) (unpublished manuscript, on file with the author). Kousser drew heavily on national survey research that dealt with racial differences in attitudes on issues such as social welfare and busing, and with racial differences in perceptions of continuing racial discrimination in various domains. *Id.* He also drew on some less well-known survey research, such as a 1993 survey devoted exclusively to probing racial attitudes in North Carolina. *Id.*

[142] In the 1980s, in fact, a far higher percentage of minority districts elected

previous minority exclusion from office, it was not surprising that minority voters often chose to elect African-American and Hispanic representatives to office when given the opportunity. This is not to say that it is desirable for African-American representatives to be confined to majority black districts, or for Latino representatives to come solely from majority Hispanic districts. Minorities should seek to represent white constituencies, liberal or conservative, and whites should seek to represent minority constituencies.

However, although we were very sympathetic to the view that, as one of us put it more than a decade ago, "[t]here is no need for spaghetti to rejoice just because linguinis are elected"[143] (that is, that the effectiveness of representation is not simply a function of a match-up between the race/ethnicity/religion of the representative and the represented), Carol Swain did not convince us when she argued in *Black Faces, Black Interests* that white representatives with substantial black constituencies represented their black constituents as well as, or better than, African-Americans represented their black constituencies.[144] Swain based her conclusions on insufficient evidence. On the one hand, she based her view that whites in heavily black districts usually represented black interests, even in the South, on an atypical sample of white liberals who represented majority black constituencies that later came to have black representation.[145] She did not con-

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whites to legislative office than majority white district elected minorities to office. *See* Grofman & Handley, *Minority Population*, *supra* note 7, at 335-36. The authors illustrated that "the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority white districts." *See* Handley & Grofman, *Black Officeholding*, *supra* note 7, at 335.

[143] BERNARD GROFMAN, REPRESENTATION AND REDISTRICTING ISSUES 97, 99 (Bernard Grofman et al., eds., 1982). The author stated, "that a representative *is not* representative of those whom he represents does not *prevent* him from representing them well, and that a representative *is* representative of those whom he represents does not *guarantee* that he will represent them well." *Id.*

[144] SWAIN, *supra* note 29, at 211. Swain argued that white representatives can be committed in representing black interests in majority white districts. *Id.* After all, white people were the architects of most civil rights and Great Society programs, enacted during a period with few black politicians. *Id.*

[145] SWAIN, *supra* note 29, at 211. According to Swain's evidence, "[m]any white

sider the broader spectrum of southern districts that had substantial black populations in the 1970s or 1980s but which elected conservative (or, at best, moderate) white representatives who were far more responsive to the white majority than to black interests. On the other hand, her criticism of black representatives from majority black districts[146] as unresponsive to their constituency's concerns seemed to us to be too harsh—filtered through an ideological prism as to what would constitute effective representation and also reflecting a double standard. If, as she claimed, black districts became safe havens for African-American incumbents who lost touch with their primarily black electoral constituencies, why would we expect white incumbents in safe Democratic or Republican seats to be any less likely to lose touch with their (predominantly white) electoral constituencies?[147]

C. Minority Districts are no Longer Necessary

The two academic authors who, more frequently than most others, propagate the claim that black success in eliciting support from white voters demonstrated that majority-minority districts were no longer necessary and the Act in general has outlived its usefulness were Abigail Thernstrom and Carol Swain. Although each also attacked the implementation of the Act on normative grounds, here we focus on factual assertions each has recently made regarding the ability of non-minority constituencies to elect minorities.[148] For instance, Swain ar-

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members of Congress perform as well or better on the indicators used in this book than some black representatives." *Id.* Swain also argued that the white members of the Congressional Black Caucus, who are not allowed to attend the CBC's closed-door meetings, were not the only white people in Congress who wanted to help blacks. *Id.* at 211-12.

[146] *See* SWAIN, *supra* note 29, at 74-141.

[147] Swain did not look at the behavior of white representatives in so-called safe districts. Therefore, she can draw no comparisons between the behavior of white representatives and African-American representatives in safe white and safe black seats respectively.

[148] Thernstrom also emphasized the lessons to be learned about contemporary Southern politics from elections such as the gubernatorial victory of Douglas Wilder. According to Thernstrom, "Virginia's voters have proved beyond a shadow of a

gued that whites (even southern whites) were now willing to vote for qualified African-American candidates, and that African-Americans could therefore win contests without resorting to majority black constituencies.[149] Of course, she suggested that these candidates needed to be moderate, or even conservative, on issues if they wished to win sufficient white support to achieve office.[150]

We have examined the evidence for both legislative office and for jurisdiction-wide offices such as mayor and determined that Thernstrom and Swain were overly optimistic in their view that whites were willing to vote for black candidates in numbers great enough to ensure election. They were also empirically misguided in their view that race-conscious districting was therefore no longer necessary to provide descriptive representation for minorities.[151]

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doubt that blacks can win in majority-white jurisdictions . . . L. Douglas Wilder being the proof of that particular pudding." Abigail M. Thernstrom, *A Republican-Civil Rights Conspiracy: Working Together on Legislative Redistricting*, WASH. POST, Sept. 23, 1991 (Final ed.), at A11. Taking nothing away from Governor Wilder, to regard his election as indicative of a general ability of blacks to get elected to state office from majority white areas in the deep South, or even in Virginia, itself, is to completely disregard the evidence. In Virginia, the only black ever elected to the state legislature from a majority white district was Douglas Wilder—and his election (with a plurality) was made possible only because a half dozen white candidates in the Democratic primary split the white vote, and Virginia does not have a majority vote requirement. Virginia was 19% black according to the 1990 census; yet no black members of Congress have been elected from the state except for the African-American elected in 1992 from the newly created majority black district.

[149] SWAIN, *supra* note 29, at 209. Swain argued that "candidates run as individuals and not as categorical groups." *Id.* Thus, people who may dislike a group could make an exception for certain individuals. *Id.*

[150] SWAIN, *supra* note 29, at 209. Swain stated that most whites believed blacks were liberal, and thus needed a lot of information about the candidate to vote for him or her. *Id.*

[151] However, Swain would also argue that substantial concerns for descriptive representation was not normatively desirable. SWAIN, *supra* note 29, at 211. For instance, she stated, "African-Americans . . . may not recognize that they are placing such a high value on descriptive representation that they are ignoring other characteristics of representation that may be in the group's interests, such as age, seniority in Congress, and history of responsiveness." *Id.*

1. Congress and State Legislatures

At least in the South, the evidence did not support Thernstrom's and Swain's claim that white voters were electing blacks to office in any numbers.[152] In the 1980s, in every southern state, the percentage of majority white legislative districts that elected a black to office was either zero or near zero. In fact, one could count on one's fingers the number of black state legislators from minority white districts in the South. (And only one hand—with some missing fingers—would be necessary to count the number of black congressional representatives elected from majority white districts.) This near complete absence of black electoral success in majority white districts occurred despite the fact that, even in the deep South, most blacks lived in majority white districts. And this pattern has *not changed* in the 1990s.

In 1992, dramatic gains occurred in the number of black legislators elected in the South, particularly at the congressional level. However, this increase was due almost solely to the fact that the number of southern congressional districts containing a black population majority increased dramatically. The South moved from four majority black congressional districts as of 1990 to 18 such districts in 1992—17 of which elected black representatives.[153]

Using data from the 1990s districting round, the present authors, along with co-author Wayne Arden,[154] updated earlier work by the present authors on the link between white population percentages and the electoral success of minority candi-

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[152] Because the pattern of racial bloc voting and the history of previous discrimination is different in the South than elsewhere in the country, we will focus our comments on the South.

[153] Hispanics, also under special Voting Rights Act protection, have made congressional and legislative gains as well, largely through the creation of districts with Hispanic majorities. *See* Grofman & Handley, *Minority Population*, *supra* note 7, at 440. The authors illustrated that Hispanics were generally not elected to Congress in districts with less than a 63% combination of minorities. *Id.*

[154] *See* Lisa Handley et al., *Electing Minority Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority Preferred Candidates*, 5 NAT'L POL. SCI. REV. (forthcoming 1996).

dates. Previous work had shown that one could attribute black and Hispanic gains in representation in the 1970s and 1980s almost entirely to the creation of majority black and Hispanic districts.[155] In the 23 states, both southern and non-southern, with greatest black and Hispanic population, we found that, once again, most of the black and Hispanic gains in state legislatures—and virtually all the gains in Congress—came from new majority-minority districts. We also found that the probability that a majority black district would elect a black legislator had gone up slightly, while, at least in the South, the likelihood that a legislative or congressional district in which a majority of the voters were white, elected a minority candidate had not increased from the minuscule probability found in previous decades.

But what about Swain's finding that, as of 1990, 40 percent of all black members of Congress were elected from non-majority black districts? According to Swain, this showed that districts where blacks were in the minority could elect black candidates.[156] However, a closer look at the cases where non-majority black districts elected African-Americans to Congress gave us a much more pessimistic picture of the likelihood of black success in white districts than Swain would have one believe. While the 40 percent figure given by Swain was technically correct, it was also fundamentally misleading.

There were 25 black members of Congress elected in 1990. Of the 10 elected from districts that were not majority black, six, in fact, were elected from districts that were majority black plus Hispanic. Therefore, only 4 congressmen were elected from districts where non-Hispanic whites were in the majority. In fact, one of these four, Rep. Jefferson of Louisiana, was elected from a district that was 45 percent black and 49 percent combined minority when it was created in 1980 but was actually 66 percent black (according to the 1990 census) by the time Rep. Jefferson was elected in 1990.[157] Another black member of

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[155] *See* Handley & Grofman, *Black Officeholding*, *supra* note 7, at 345-50; *see also* Grofman & Handley, *Minority Population*, *supra* note 7, at 439-43.

[156] SWAIN, *supra* note 29, at 216.

[157] According to Swain, however, the voting-age percentage population of blacks

Congress elected from a majority white district was Rep. Franks of Connecticut, a Republican conservative who almost certainly was elected over the opposition of his black constituency.[158] Thus, only two of ten congressional representatives serving in 1990 were minority-preferred candidates elected from majority white districts. One, Rep. Wheat of Missouri, ran with the advantage of incumbency in a district where he won the Democratic primary with only 32 percent of the vote—a primary where he received almost no white support and which he won only because whites divided their vote among seven white candidates.[159] The other, Rep. Dellums of California, was elected from perhaps the most liberal district in the nation which combined blacks in Oakland with the ultra-liberal city of Berkeley.

In short, one of the four African-Americans whom a majority white district elected to Congress in 1990 was really elected from a majority black district using 1990 population figures; one was a black Republican who did not enjoy much black support, and the other two exceptions to the rule that blacks win only in majority-minority districts were very unusual cases that one could not accept as the basis for reasonable expectations for the success of black-endorsed African-American candidates in majority (non-Hispanic) white districts.[160] Moreover,

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in Jefferson's district was 52%. SWAIN, *supra* note 29, at 75.

[158] Swain argued that Rep. Franks was an example that "partisanship and region are far more important than race in predicting whether representatives will pursue black interests." SWAIN, *supra* note 29, at 212. Franks was the only black to vote for the Gulf War, against civil rights legislation, and against family leave. *Id.*

[159] For an extensive discussion of the Fifth District of Missouri (Wheat's district), see SWAIN, *supra* note 29, at 116-27.

[160] Swain failed to draw the proper inferences from her facts about the special circumstances under which African-Americans are elected to Congress from non-majority black districts, and how unlikely those circumstances are to be applicable to future black candidates in majority white districts. Swain did provide data on Hispanic population and did discuss these majority-minority districts as a separate category from the other districts where blacks constitute less than half of the population, but her concluding chapter is not sufficiently sensitive to the implications of the importance of the Hispanic population. SWAIN, *supra* note 29, at 213-17. For example, we are as yet unlikely to see many new congressional districts

not a single majority white congressional district in the South elected an African-American to Congress in 1990, including the Mississippi 4th congressional district, which was over 40 percent black according to the 1990 census.

African-American candidates in non-majority black districts fared no better after the 1990s round of redistricting. In 1992 and 1994 majority black districts again elected all black members of Congress from the South.[161] The one new African-American not elected from a majority black district was a Republican who won in 1994 without majority black support in a district outside the South.[162]

David Lublin has replicated and extended some of the earlier work of the present authors on the link between minority population percentages and the probability of a minority winning congressional office, and his conclusions are as straightforward as ours—and completely contradictory to those of Swain:

> The dramatic increase in African-American and Latino congressional representation has rested entirely on vastly improved access to the ballot combined with the creation of new majority-minority districts. Nonracial demographic variables, such as income and urbanicity, often exhibit a strong bivariate correlation with the race of a representative. Howev-

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with a black plurality and a combined black plus Hispanic majority in the South, although changing patterns of immigration make such a scenario much less implausible than it used to be.

[161] Swain, writing before the results of the 1990s round of districting were known, observed that creating additional black majority districts could have only limited payoffs for gains in the number of blacks elected to Congress because geographical constraints limit the number of such districts that can be drawn. SWAIN, *supra* note 29, at 211. But if Swain were right in her expectations, then we should have seen black congressional gains primarily in non-majority black districts. Yet, in 1992 there were 13 new black members of Congress—the largest gain in any single redistricting period—and all of these black members were elected from majority black districts. Of course, with blacks becoming a declining share of the total U.S. population, virtually all of the majority black congressional seats that might be drawn have already have been created in the 1990s round of districting. Thus, in the long run, Swain is correct that the election of substantial numbers of new black members of Congress in succeeding decades can come only from majority white districts.

[162] Rep. J.C. Watts was elected to Congress from Oklahoma.

> er, the link between these variables and the election of a minority member of Congress rests entirely on the strong relation between the racial composition of the district and other demographic characteristics. African-Americans and Latinos differ substantially from Anglos on a number of demographic measures, so black and Latino majority districts differ as well. If the Supreme Court's decisions in *Shaw v. Reno* and *Miller v. Johnson* result in a reduction in the number of majority-minority districts, the number of African-American and Latino representatives will almost certainly decline as well.[163]

2. Mayors

In a recent piece in *The Public Interest*, Thernstrom asserted that over the last thirty years, 83 percent of all black mayors in cities above 50,000 have been elected from majority white cities, and she cited this figure as evidence for the proposition that blacks can gain sufficient white support to win office in majority white jurisdictions.[164] As we demonstrated below, while this 83 percent figure may have been factually accurate, it was much less impressive when examined in detail than it may seem at first blush. Because Thernstrom reported only a summary percentage and not the data on which it is based, we will refer to a study the present authors conducted, as well as a study done by Thomas Cavanagh to examine this issue in greater depth.

Our analysis, as well as the work of Cavanagh, indicates that: one, the actual number of black mayors is quite small;[165] two, even if the percentage of black mayors elected from majority white cities is high, the percentage of majority white cities that elect black mayors is quite low, especially when compared

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[163] David Lublin, The Election of African-Americans and Latinos to the U.S House of Representatives, 1972-1994, 20 (Sept. 15, 1995) (unpublished manuscript, on file with the *Mississippi Law Journal*).

[164] Abigail M. Thernstrom, *Black Republicans?*, 120 THE PUB. INTEREST 106, 110 (1995) (book review).

[165] Thomas E. Cavanagh, Voting Rights in a New Key: Using Seats/Votes Models to Evaluate African-American Representation 43 (Sept. 19, 1995) (unpublished manuscript, on file with the *Mississippi Law Journal*).

to the percentage of majority black cities that elect black mayors;[166] three, the percentage of majority white cities that elect black mayors is lower in smaller cities and towns than in the larger cities examined by Thernstrom, as well as being lower in the South than in the non-South;[167] and four, even when we create control groups for black population to test the hypothesis that blacks are elected in cities in proportion to the percentage of blacks in the population (the success rate we would expect if voting were color-blind), we find blacks under-represented in white majority cities.[168]

Cavanagh looks at black mayoral success in cities with populations above 10,000 that directly elect mayors.[169] Of the 1,425 cities in this category, as of 1987, there were only 37 with a black mayor (7 in the deep South and 30 in the rest of the country).[170] Thus, overall, only 2.6 percent of these cities elected black mayors. More importantly, 19 of the 37 black mayors were elected from the 35 majority black cities included in this category (54.3 percent of the majority black cities examined elected black mayors); and the other 18 black mayors were elected from the 1390 non-majority black cities examined (1.3 percent of the non-majority black cities studied elected black mayors), and only 14 of these 18 mayors were actually elected from majority white cities.[171]

The present authors also collected and analyzed mayoral data from the 1980s, but for cities that were then either above 150,000 in population or central cities of what was once called SMAs. This data is shown in Table 1.

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[166] Cavanagh, *supra* note 165, at 44.

[167] Cavanagh, *supra* note 165, at 44-45. Cavanagh wrote, "[i]n cities where half of the voting age population is black, the final model predicts that black mayors will be elected only 19.2% of the time in the North and only 3.2% of the time in the South." *Id.*

[168] Cavanagh, *supra* note 165, at 45-46.

[169] Cavanagh, *supra* note 165, at 43.

[170] Cavanagh, *supra* note 165, at 44.

[171] Cavanagh, *supra* note 165, at 44.

Table 1

Percentage of Cities Above 150,000 with and without a Black Mayor for Majority White and Majority Black Cities

	Majority White Cities	Majority Black Cities
No Black Mayor	94.1%	13.6%
Black Mayor	5.9%	86.4%
(N)	(321)	(22)

The percentages in Table 1 indicate that the election of an African-American mayor from a majority white city is rare. But how would Thernstrom report this data? Well, 19 black mayors are elected from the 321 majority white cities and 19 black mayors are elected from the 22 black majority cities; thus half of all black mayors in very large cities in the 1980s came from majority white cities. But this 50 percent figure is really not that impressive since nearly 94 percent of all cities in the data set are majority white in population. Similarly, Thernstrom's 83 percent figure is not as impressive as it might first appear, since about 95 percent of the cities above 50,000 are majority white.

Moreover, for much of the 30 year time span that Thernstrom was examining there were very few black mayors, even in majority black cities (recall that in 1987 there were only 37 black mayors in cities over 10,000 and Thernstrom included only cities over 50,000 in her calculation). Even occasional black successes in the large pool of majority white cities will constitute a large proportion of all elected black mayors over the 30 year period if many of the majority black cities failed to elect black mayors for much of the period.[172]

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[172] For example, if, on average over the 30 year period, one fifth of the majority black cities elected black mayors and a little over 5% of the majority white

In order to test the hypothesis that voting for the office of mayor is color-blind, we can compare the mean black population percentage for any group of cities to the percentage of black mayors in these cities. For example, using our database of cities above 150,000, the mean percentage black of the majority white cities is 14.6 percent. Therefore, if voting is color-blind, we would expect 14.6 percent of the majority white cities to have black mayors. As noted earlier, we found that only 5.9 percent of the majority white cities had black mayors, however. On the other hand, we would expect 65.7 percent of the majority black cities to have black mayors if voting was color-blind since the mean percentage black of this group of cities is 65.7 percent. We found that, in fact, 86.4 percent of the majority black cities had elected black mayors. This analysis leads us to conclude that the color-blind hypothesis does not fit the data.

Table 2 provides a summary display of the expected percentage of cities with black mayors for both hypotheses and the actual percentage of cities with black mayors.[173]

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cities did so, then we could obtain the result that 83% of the black mayors elected served majority white cities.

[173] In order to explore the relationship between the percentage of black in the population and the election of a black mayor further, we divided the sample cities regionally and found that the deviation from color-blind expectations is even greater in the South than in the nation as a whole.

Table 2

Comparison of the Predicted Percentages of the Two Hypotheses to Actual Percentages

Percentage of Cities Above 150,000 with Black Mayors

	Majority White	Majority Black
Racial Polarization Hypothesis	0.0%	100.0%
Color-Blind Hypothesis	14.6%	65.7%
Actual	5.9%	86.4%

D. Minority Districts Counterproductive to Minority Interests

A number of commentators have argued that creating majority-minority districts is actually counterproductive to minority interests because it diminishes the incentives for cross-racial coalitions and for white representatives to pay attention to the concerns of black voters in their districts. More importantly, according to these critics, creating majority-minority districts makes it more difficult for Democrats to get elected to office and, ultimately, for policies favorable to minority interests to be passed.

1. Decreased Incentives for White Legislators to Consider Minority Interests

The majority-minority districts commentators were objecting to were among the most integrated in the nation, with minority populations not far from 50 percent. Thus, there was a remarkable double standard operating when these commentators argued that a district with, say, a 55 percent black majori-

ty leads to racially divisive politics, while a district with a 55 percent, or even 75 percent, white majority is integrated and conducive to coalition politics. If white representatives in majority white districts were assumed to be interested in building coalitions that include the minority voters in their districts, do we really wish to assume that black representatives in majority black districts have no such interest?

In *Shaw*, Justice O'Connor stated that racially motivated majority-minority districts made it more likely that elected officials would "believe that their primary obligation is to represent only the members of [the predominant] group, rather than their constituency as a whole."[174] She cited no evidence for this proposition. In fact, because most of the southern black congressional districts were only narrowly majority black in voting age population and may not have been majority black in terms of the actual electorate, an argument could be made that the representatives serving these districts would be especially attentive to at least some white voters because some white votes would be needed to win. Moreover, a good argument can be made that representatives most likely to disregard the views of their black constituents were Republicans elected from southern congressional districts. Because it was clear that blacks are unlikely to have voted for the Republican candidate, the Republican representative has no incentive to take black interests into account. Indeed, there is no relationship between the percentage black of a district and support for issues endorsed by blacks among southern Republican House members —southern Republicans in the 1990s are simply uniformly very conservative[175]

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[174] Shaw v. Reno, 113 S.Ct. 2816, 2827 (1993).

[175] *See* Bernard Grofman et al., Catastrophe in Congress, Homicide on the Hill: Is the Voting Rights Act Responsible for the Democratic Debacle of 1994? 22 (unpublished manuscript, on file with the author). Moreover, even the white Democratic representatives of southern congressional districts with 20-30% black populations—a district type that was common in the South in the 1970s and 1980s—were not that liberal because they knew that their black voters were "captives" who had little choice but to vote for the "better of two weevils," that is, the Democrat. *Id.*; *see also* Bernard Grofman et al., *The Effect of Black Population on Electing Democrats and Liberals to the House of Representatives*, 17 LEGIS. STUD. Q. 365, 379 (1992) [hereinafter Grofman, *Black Population*] (examining

Not only did Justice O'Connor fault majority-minority districts with decreasing the attention white legislators were willing to give to minority interests, she also claims that the creation of these districts "may exacerbate . . . patterns of racial bloc voting. "[176] She observed that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."[177] Again, she cited no empirical evidence for these propositions. In fact, a compelling argument could be made that if white voters reside in a district represented by an African-American or an Hispanic, the experience may serve to mitigate rather than exacerbate white racism and reduce rather than increase levels of racially polarized voting. For example, when Rep. Mike Espy first won the 2nd congressional district in Mississippi in 1986, he won with 52 percent of the vote, but he won reelection in 1988 with 65 percent and in 1990 with 84 percent of the vote—carrying 43 percent of the white vote in 1988 and 70 percent of the white vote in 1990.[178]

2. *Loss of Democratic Seats in Congress*

A number of commentators have claimed that the creation of majority-minority districts led to the downfall of the Democratic party, particularly in the South. These critics claim that drawing minority districts "bleached" so many surrounding districts that the Republicans were able to gain control of the House of Representatives for the first time in 46 years. For example, according to Will, "[r]acial gerrymandering is one reason Newt Gingrich is Speaker."[179] We believe that this was an overstatement. While the creation of minority districts in the South may have led to some additional Republicans being elected to Congress, the fact is that the Republicans would have gained control of the House regardless, simply because of

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relationships between black population and congressional liberalism over three decades).

[176] Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993).

[177] *Shaw*, 113 S. Ct. at 2832.

[178] MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1992 690-91 (Eleanor D. Evans ed., 1991).

[179] Will, *supra* note 28, at 64.

the increase in the number of white voters who cast their ballots for Republican candidates.

In examining this contention, we believe it important to distinguish between three easy to confuse questions. The first is: Did the Democrats suffer greater losses between 1990 and 1994 in the areas of the country where new minority districts were drawn than elsewhere? The second is: If the districting lines in 1990 had been used in 1994, and in 1992, would Democrats have done better; and, the flip side, if the districting lines in 1994 had been used in 1990, would the Democrats have done worse? The third question is: Would the optimal arrangement of black voting strength across congressional districts have permitted the Democrats to hold on to some of the seats they lost? The answers to these different questions need not point in the same direction vis a vis the partisan consequences of districting. The question asked largely determines whether one can conclude that the Voting Rights Act has proved very costly to the Democrats in Congress in the 1990s.

The answer to the first question—whether Democrats suffered greater losses in the areas of the country where new majority black districts were drawn—seems to be no. Looking at this question, historian Allan Lichtman found that in 1994 "in the nine states with new black districts. . . [Democrats] lost 19 percent of the seats they had held; as against 21 percent in the [other 41 states that did not draw new black districts]."[180] Of course, on balance, almost all of the much more limited Republican gains in 1992 occurred in the first set of states; thus looking only at 1994 understates the impact of 1990s districting on Republican gains,[181] but even taking these 1992 gains into account does not change the basic result that Republican congressional gains between 1990 and 1994 occurred virtually everywhere. Moreover, although Republican gains

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[180] Allan Lichtman, *Quotas Aren't the Issue*, N.Y. TIMES, Dec. 7, 1994, at A23.

[181] We have to be very careful in looking at 1992 results. In the South, because of population gains, new congressional seats were added. In a number of seats, the Democrats actually did just as well in 1992 in the South as in 1990, yet Republicans gained 9 seats in the South from 1990 to 1992—thus, the Democratic percentage of southern congressional seats declined even though the number of seats held by Democrats did not.

between 1990 and 1994 were a bit larger in proportional terms in the states that drew new majority black seats in the 1990s than in those that did not, the first set of states also exhibited a somewhat greater decline in mean support for Democratic congressional candidates between 1990 and 1994.

The answer to the second question—whether the changes in lines cost Democrats seats—has been disputed. At one end of the continuum, the NAACP Legal Defense and Educational Fund concluded that Democratic losses in 1994 were due entirely to changes in the preferences of white voters.[182] Indeed, that report goes further to claim that, on balance, new black seats in the South actually helped Democrats: "destroying and fragmenting minority districts would have saved with certainty only one Democratic seat in North Carolina, while probably costing the Democrats seats in Mississippi, Georgia and Texas."[183] On the other side of the continuum, Lublin concludes that "the creation of new majority-minority districts assured that the Republicans won solid control of the House in 1994."[184]

Lublin focused on seats decided by relatively small margins which lost substantial black population between 1990 and 1992 and which shifted to the Republicans by 1994.[185] He noted that many of these seats could have remained in Democratic hands if the black population in these districts had been held at their previous levels. Moreover, he observed that redistricting has had a cumulative effect: by adding Republican incum-

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[182] Report of the NAACP Legal Defense & Educational Fund, The Effect of Section 2 of the Voting Rights Act on the 1994 Congressional Elections, 4 (Nov. 30, 1994) (unpublished manuscript, on file with the *Mississippi Law Journal*). This report is marred by unrealistic assumptions and misleading analysis. *See* David Lublin, Racial Redistricting and the New Republican Majority: A Critique of the NAACP Legal Defense Fund Report on the 1994 Congressional Elections, June 3, 1995) (unpublished manuscript on file with the *Mississippi Law Journal*).

[183] Report of the NAACP Legal Defense & Educational Fund, supra note 182, at 2.

[184] David Lublin, Racial Redistricting and Public Policy in the U.S. House of Representatives (June 2, 1995) (unpublished manuscript, on file with the *Mississippi Law Journal*) [hereinafter Lublin, Racial Redistricting].

[185] *Id.*

bents in the South in 1992, Republicans had additional incumbency advantages in 1994 and this advantage is lost sight of when we take the Republican vote share in 1994 as exogenously given.

John Petrocik and Scott Desposato come out somewhere in the middle.[186] These authors emphasize that Democrats in the South did a rather good job of redrawing lines given the two severe constraints they faced: the need to draw additional black majority seats lest plans be denied preclearance, and a reduction in both the number of and the loyalty of Democratic party identifiers in the South.[187] In particular, Petrocik and Desposato argued that many of the black voters used to form the new black majority seats were pulled from districts that were already Republican, thus minimizing the costs to Democrats;[188] and that the burden of running in a district with radically redrawn district lines was placed on Republican incumbents to the greatest extent possible.[189] Nonetheless, since there were more Democratic seats to begin with, more 1990 Democratic incumbents were impacted by changes in their old district lines than Republican incumbents. But the real problems faced by Democrats in the South were the decline in black turnout relative to white turnout in the South, especially in 1994, and the major decline in the willingness of white voters to support Democratic congressional candidates, especially in 1994. In Petrocik's and Desposato's view, creating majority-minority districts would not "have defeated many Democratic incumbents if the election tide [in 1994] had been less hostile to the Democrats."[190]

The present authors, along with our co-author Richard Griffin, have also addressed the question of whether Democrats

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[186] John Petrocik & Scott Desposato, The Partisan Consequences of Majority-Minority Redistricting in the South, 1992 and 1994 4-5 (unpublished manuscript, on file with the *Mississippi Law Journal*).

[187] Petrocik & Desposato, *supra* note 186, at 5.

[188] *See* Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 59 J. POL. 384, 386-87 (1995) (evaluating effects on Republican electoral success).

[189] Petrocik & Desposato, *supra* note 186, at 6-7.

[190] Petrocik & Desposato, supra note 186, at 17.

could have done better in 1994 (and in 1992) had the congressional lines in place been those from 1990. Like Petrocik and Desposato, we come out somewhere in between the views of Lublin and those of the NAACP Legal Defense and Educational Fund. Just as the NAACP Legal Defense Fund report neglected some of the negative consequences of creating majority-minority districts (for example, the incumbency advantage enjoyed by Republicans who won office in 1992 and sought reelection in 1994), Lublin neglected the positive side. By focusing only on the seats where black population losses led to Democratic losses, Lublin ignored the increased certainty of Democratic success in the newly created majority black seats.[191]

Using a methodology that projected vote outcomes from 1994 into 1990s districts and also projected vote outcomes from 1990 into 1994 districts — a methodology that was sensitive to the overall consequences of changes in the distribution of black population for the probability of Democratic success and considered both those districts where black population losses might have led to Democratic losses and those districts where black population gains increased the certainty of Democratic successes—we showed that, in net terms, as few as 2 to 5 of the 24 or so southern congressional seats lost by the Democrats between 1990 and 1994 might be a direct result of 1990s redistricting.[192] The rest of the losses are attributable to the fact that Republican congressional candidates across the board got a lot more votes in the South in 1994 than they did in 1992. Indeed, Republicans showed slightly greater vote gains in 1994 in the deep South than in the rest of the count.

However, the present authors also acknowledged Lublin's point that one of the reasons Republicans received more votes in 1994 is that there were somewhat fewer white (southern) Democratic incumbents in 1994 than there otherwise might

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[191] Lublin, in effect, was selecting on the independent variable, and thus introducing bias into his estimates by focusing only on seats where new minority districts led to Democratic losses. Lublin, Racial Redistricting, *supra* note 184, at 6-14.

[192] Hill used a similar approach when he examined 1992 votes in districts with the 1990s distribution of black population shares. Hill, *supra* note 187, at 387.

have been as a result of 1990s line drawing.[193] Thus, some of the impact of the line drawing on Democratic losses should be seen as indirect. Taking that indirect loss into account would increase the importance of creating new majority black districts as a factor in southern Democratic congressional decline, but the present authors still rejected the claim that drawing majority black seats affected control of the House in 1994.[194] Even if Lublin's method of calculation was used, the present authors found that drawing new majority black seats during the 1990s round of districting cost the Democrats no more than 9 or 10 of the 62 seats they lost between 1990 and 1994 (rather than 13 seats that Lublin claims Democrats lost as a result of redistricting). Thus, our answer to the question of whether the new district lines cost the Democrats seats was yes—but not as many as was sometimes claimed. The present authors also addressed the third question of whether an optimal distribution of black voters across districts could have significantly improved Democratic fortunes. Lublin also addressed this question, although he is somewhat less clear that this was the question he is considering, when he argued that, "[a]lthough Newt Gingrich probably would have been elected the first Republican Speaker of the House in 40 years by a margin of one or two votes even without racial redistricting, the creation of black majority seats assured that Republicans won a firm majority of 26 seats instead of a razor-thin majority."[195]

While we did not, in our work with Griffin, provide an exact estimate of the number of seats that might have changed had the Democrats made near optimal use of black voters to shore up Democratic seats in the South against the Republican tide, we also concluded that optimal (from the standpoint of the Democrats) districting could have made a considerable difference in Democratic losses. Our analysis suggested that even optimal districting could not have saved more than 10 or 11

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[193] Lublin, Racial Redistricting, *supra* note 184, at 7.

[194] *See* Lichtman, *supra* note 144, at A23. "Even if the Democrats had kept every one of their [1992] seats in the nine redistricted states [that drew new black majority seats], losses in the other states would still have cost them their majority in the House." *Id.*

[195] Lublin, Racial Redistricting, *supra* note 184, at 15.

seats in the states where new majority black seats were drawn, however.[196]

Moreover, we emphasize that hindsight is the only exact science, that is, what could be shown to be an optimal plan with the hindsight of the 1994 election results in hand would not have looked like an optimal allocation in 1990. In the 1980s, creating southern congressional districts with a 20 to 30 percent black population would have made sense for the Democrats.[197] But, with hindsight, the Democrats in the 1990s round would have been better off drawing districts with a 30 to 40 percent black population. Post-hoc determination leads us to overstate what might have been done had redistricters been more concerned with protecting Democrats and less concerned with drawing new black districts, because it overstates the potential for reasonable foresight. This also neglects the marginal positive impact of the greater electoral security for Democrats in the majority black seats that were created.

3. *Reduced Liberalism in Congress*

Lublin argued that Republican gains made possible by the creation of (additional) black districts, especially those in the South, had the net effect of reducing congressional liberalism, and thus reducing the likelihood that bills supported by black legislators will pass.[198] We believe this claim was largely in-

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[196] This estimate of 10 seats is almost certainly an upper bound because, given geographic constraints, it would have been impossible without excessively tortuous lines to convert even as many as half of the previously 20 to 30% black population districts that existed in the 1980s plans into districts with between 30 and 40% black population—the black population percentage that was, as of 1994, optimal for the Democrats' election chances.

[197] *See* Grofman, *Black Population*, *supra* note 177, at 371. Grofman hypothesized:

> In the South, the greater the proportion black in a district, the more likely it is that a Democrat will be elected from their district, except that, in 1971 and thereafter, there may be curvilinearity such that districts are either 20 to 30% black or more than 40% black are more likely to elect Democrats than are districts that are 30 to 40% black.

Id.

[198] Lublin, Racial Redistricting, *supra* note 184, at 27.

correct.

Even if we posit that every new black congressional seat in the South led to a net loss of one white Democrat[199] which seems to be unrealistically high, our analysis indicates that creating black seats is essentially a wash as far as mean liberalism in the House. In 1994, the average southern African-American representative had an ADA score of 85; the average southern white Democrat had an ADA score of approximately 46, with only minimal variation as a function of the percentage black of the congressional district (except for a couple of districts in the 40 to 50 percent black population range where the representatives were actually *less liberal* than those from districts with fewer blacks). The average southern Republican had an ADA score of approximately 6 in 1994, and this score was completely independent of the black percentage of the district. Replacing two southern white Democrats with a Republican and a black Democrat would only move the combined ADA scores slightly, from a combined ADA score of 92 to a combined ADA score of 91. Certainly, Republicans are a lot more conservative than white Democrats, but southern white Democrats are equally more conservative than black Democrats elected from majority black seats!

Of course, replacing moderate/conservative white Democrats with conservative Republicans and liberal black Democrats may have other policy implications. For example, the loss of conservative white Democrats "empties out the center," which sharpens partisan conflict. And if enough Republicans win, as in 1994, partisan control of the House can shift. Once partisan control shifts from Democratic to Republican hands, policy liberalism is reduced, because it is the ideological location of the mean of the party controlling the House that usually matters more for what policies are enacted than the ideological location of the overall House mean.[200]

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[199] It is highly implausible that we can blame the new black districts for more than a one for one net loss of Democratic seats. *See supra* notes 184-97 and accompanying text.

[200] Relatedly, Eddie Williams observed that, while the number of black state legislators continued to grow in 1994, with a "net increase of 16 (12 Democrats and 4 Republicans), . . . bringing the total to 529," with GOP gains in state leg-

E. Long Term Consequences of the Voting Rights Act for the Democratic Party

When Lyndon Johnson pushed for the passage of the Voting Rights Act of 1965, he did so with the belief that it may well doom the Democratic party's future chances in the South, although he also recognized that without it, the Democratic party in the South was probably doomed anyway.[201] In fact, the association of the national Democratic party with such civil rights initiatives as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, has led to a dramatic decrease in support for the Democratic party, at least at the presidential level, in the South—the vast majority of white voters in the South simply will not vote for a Democrat for president. This decline in support is greatest in the areas of the South with the highest percentage black population, despite the fact that these voters (some not enfranchised until the late 1960s) vote solidly Democratic.[202] This increase in support for Republican presidential candidates in the South has recently begun to filter down to the congressional level.

If we look at the relationship between Democratic vote shares and black percentage in congressional districts in the South, we find that, while it used to be true that Democrats had a better than 50 percent chance of winning even those districts where there was minimal black voting strength, by 1992, it was only in southern districts with more than 10 percent black population that Democrats were able to win more

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islatures, "the number of black Democrats in the majority party in state lower houses will decrease from 349 to 257, a drop of 26 percent. Eddie Williams, *Hard Times, Tough Choices*, FOCUS, Jan. 1995, at 1, 4. Conversely, the number serving in the minority party will increase from 22 to 122; black legislators will lose key leadership posts and the access to the clout that the majority party wields." *Id.*

[201] *See* MARK STERN, CALCULATING VISIONS: KENNEDY, JOHNSON, AND CIVIL RIGHTS 214 (1992). Johnson realized that the southern black vote was crucial to Democratic success in presidential elections. *Id.* As a result, "the white South was abandoning its ties to the Democratic alignment." *Id.*

[202] *See* Grofman, *Wallace Vote*, *supra* note 97, at 153. The authors illustrated that "black support for the Democratic nominee is constant." *Id.* This increase in black support of Democrats, of course, greatly impacted the party's platform. *Id.* at 159.

than half of the seats; and in 1994, it was only in districts with more than 30 percent black population that Democrats could be sure of winning more than half of the seats. The percentage of congressional seats won by Democrats by the percentage black of the congressional district is found in Table 3.

Table 3
Percent Democrats in Congress by Percent Black in Congressional District, 1990-1994

	Percent Black in Congressional District					
Year	0 - 9.9%	10 - 19.9%	20 - 29.9%	30 - 39.9%	40 - 49.9%	50%+
1990	53.1	64.5	74.1%	70.0	100.0	100.0
	(32)	(31)	(27)	(20)	(2)	(4)
1992	39.2	68.8	66.7	100.0	100.0	100.0
	(51)	(32)	(32)	(3)	(1)	(17)
1994	33.3	53.1	33.3	100.0	100.0	100.0
	(51)	(32)	(21)	(3)	(1)	(17)

As black voters become increasingly important to Democratic electoral success, and as Republicans win more and more of the heavily white seats, the character of the Democratic constituency and of Democratic elected officials has begun to change accordingly. Increasingly, in the South, the Republicans have become the party of white voters and the Democratic party has become the party of black voters. In Georgia, for example, as the result of the 1994 elections and a party switch by a Democratic incumbent (in the 9th congressional district), there is not a single white Democrat in the Georgia congressional delegation. This fact has no doubt led other white Democratic politicians in Georgia (and elsewhere in the South) to reassess the benefits of continued allegiance to the Democratic party.

The "blackening" of the Democratic party in the South has precipitated a "chain reaction" effect, making it less and less likely that Democrats will ever regain white support as the center of gravity within the Democratic party in the South

shifts toward black interests,[203] and as the incumbency advantage shifts to the Republicans. Moreover, we can expect a kind of top-down realignment based on "progressive ambition," in which the potential for Republican success at the congressional level makes it more likely that strong Republican candidates will seek state legislative office as a springboard to higher office. An increase in Republican state legislative strength in the South will provide an increased pool of strong Republican congressional candidates, making it more likely that Republicans will be able to hold on to their recent gains in congressional seats in the South. This realignment will eventually percolate down to the local level in the South.[204]

Given this scenario, we conclude by noting that although majority-minority districts specifically are not to blame for the rising tide of Republican officeholders in the South, the Voting Rights Act in a much more general sense is indirectly responsible for the massive migration of white voters from the Democratic party.

IV. CONCLUSION

Justice O'Connor's opinion in *Shaw* seeks the moral high ground by attacking the creation of majority black districts as tantamount to apartheid. However, if voting is polarized along racial lines and minority candidates usually lose—preconditions necessary for the Voting Rights Act to apply—then the failure to draw districts in which the majority of voters are minorities perpetuates situations in which, for all practical purposes, minorities will be shut out of office. In a world of race-conscious voting, race-conscious remedies are needed. We must be careful that a zeal to end a supposed over-reliance on racial consider-

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[203] *See* THOMAS EDSALL & MARY EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS 4 (1991). The authors argued that race and taxes changed the voting behavior of many people, causing a "chain reaction" that realigned the electorate. *Id.*

[204] The possible exceptions to a realignment at the local level are Louisiana, because of its peculiar nonpartisan primary arrangements, and Mississippi, because its very large black population may anchor its state and local Democrats against the white Republican tide.

ations in the districting process does not retard the integration of the halls of our legislatures.

It seems plausible to believe that normative/constitutional judgments are shaped at least in part by views about consequences, and thus by views about social facts. While cases such as *Shaw* would probably have been decided the same way even if the majority of Justices had been persuaded to change their minds about certain important factual claims such as the supposed absence of barriers to minority electoral success from majority white districts, or the view that blacks do not have important political interests in common with one another simply because they are black, or the assertion that drawing majority black districts exacerbates racial tensions, we would like to believe that it is unlikely that the majority would have been quite so fervent in their denunciation of the evils of majority black districts and in their likening of such districts to racial apartheid.[205]

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[205] In any case, as social scientists, we are bothered by the remarkably casual way in which the Supreme Court Justices throw out empirical assertions that lack factual grounding as if they were simply so obvious as to not need supporting justification. For example, *Shaw* is misguided in its views that the majority-minority districts that have been created can be analogized to "racial apartheid." *See supra* note 57 and accompanying text. As noted earlier, usually these districts are the most racially balanced districts in a state.

THE COUNTERREVOLUTION IN MINORITY VOTING RIGHTS

Laughlin McDonald[*]

I. INTRODUCTION

Prior to passage of the Voting Rights Act in 1965,[1] there were fewer than two hundred black elected officials nationwide and fewer than one hundred in the seven Deep South states[2] specifically targeted by the special preclearance provisions found in section 5 of the Act.[3] By January, 1993, the

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 446 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

[2] Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1252 (1989); *see also* U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 15 (1968) (discussing increase of elected black officials in Deep South states after passage of Voting Rights Act of 1965). Following the passage of the Voting Rights Act of 1965, the increased registration of black voters, particularly in the Deep South, resulted in a substantial increase in black voting. *Id.* at 14.

[3] Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1988). Section 5 requires jurisdictions with long histories of discrimination against minorities in registering and voting to submit their proposed changes in voting to the Attorney General of the United States or to the United States District Court for the District of Columbia for preclearance. *Id.* Whether preclearance is administrative or judicial, the jurisdiction "bears the burden of proving" that a proposed voting change does not have a "discriminatory purpose and effect." City of Rome v. United States, 446 U.S. 156, 183 n.18 (1980); *accord* Georgia v. United States, 411 U.S. 526, 538 & n.9 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966). Section 5 originally targeted Southern States which had discriminated against African Americans. *Katzenbach*, 383 U.S. at 329-30. However, Congress amended the Act in 1975 in order to include "language minorities." Act of Aug. 6, 1975, Pub. L. No. 94-73, § 207, 89 Stat. 400, 402 (1975) (codified as amended at 42 U.S.C. § 1973l(c)(3) (1988)). Congress defined the term "language minorities" as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." § 207, 89 Stat. at 402. As a result, the statute now covers 16 states or

number had grown to 8015 nationwide and 3704 in the covered Southern States.[4] There is a general consensus that this extraordinary increase in minority office holding is linked directly to the increase in the number of majority-minority electoral districts created as a result of the Voting Rights Act.[5] Since the enactment of the Voting Rights Act in 1965 and subsequent amendments, this substantial increase in minority office holding has commonly been referred to as a "quiet revolution."[6]

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parts of states, from New York to California. *See* 28 C.F.R. pt. 51 app. at 113-14 (1995) (listing applicable jurisdictions of section 5 preclearance requirement). In 1982, Congress amended section 5 of the Voting Rights Act to expire on August 4, 2009. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133 (codified as amended at 42 U.S.C. § 1973b(a)(8) (1988)) (applying 25 year expiration period from effective date).

[4] JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER xi (1993) [hereinafter NATIONAL ROSTER].

[5] Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction, in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 378, 386 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION]. *Quiet Revolution* is a collaborative effort by 27 political scientists, historians, and lawyers funded by the National Science Foundation. *See* Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359 (1995) (book review). Pildes stated that *Quiet Revolution*, "[u]tterly free of ideological cant, . . . presents the most sober, comprehensive, and significant empirical study of the precise effects of the [Voting Rights Act] ever undertaken." *Id.* at 1362. The three principal conclusions reached by *Quiet Revolution* are:

> First, the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South. Third, the increase in the number of black districts in the South is primarily the result not of redistricting changes based on population shifts as reflected in the decennial census but, rather, of those required by the Voting Rights Act of 1965 and its 1982 amendments.

Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations, in* QUIET REVOLUTION, *supra* at 335, 335-36.

[6] McDonald, *supra* note 2, at 1252; *see* Davidson & Grofman, *supra* note 5, at 389 n.2 (noting that "the use of voting rights litigation to counter the resistance of white officials to minority political empowerment has largely escaped public attention"). This "quiet revolution" was a response to white officials' reliance "on more subtle mechanisms of vote restriction aimed primarily at prevent-

Today, majority-minority districts are under siege as never before. The trend began with *Shaw v. Reno*,[7] in which the Court held that white plaintiffs could challenge *bizarrely* shaped majority-black congressional districts.[8] Then, in *Miller v. Johnson*,[9] the Court invalidated the majority-black Eleventh Congressional District in Georgia based on the grounds that: (1) race was the predominant factor in drawing district lines; and (2) the state had subordinated its traditional districting principles to race without having a compelling reason for doing so.[10] Accordingly, the Court has called into question the constitutionality of all majority-minority districts.[11] Two members of the Court have gone so far as to argue that the Voting Rights Act should be restricted to exclude all claims of minority vote dilution and that the creation of majority-minority districts rests upon assumptions that "should be repugnant to any nation that strives for the ideal of a color-blind Constitution."[12] In doing so, the Court has

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ing minority voters from electing the candidates of their choice." QUIET REVOLUTION, *supra* note 5, at 3. Some mechanisms used "to resist the full incorporation of blacks . . . into the polity" included "the submergence of minority voting strength in at-large or multimember districts and the gerrymandering of district lines." *Id.*

[7] 509 U.S. 630, 113 S. Ct. 2816 (1993).

[8] *Shaw*, 113 S. Ct. at 2828. The Court held that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.*

[9] ____ U.S. ____, 115 S. Ct. 2475 (1995).

[10] *Miller*, 115 S. Ct. at 2490-91. By invalidating the majority-black Eleventh Congressional District in Georgia, the Court stressed that "'the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at 2493 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

[11] *See, e.g., id.* at 2492 (stating that "race based districting . . . by definition raises a serious constitutional question); *Shaw*, 113 S. Ct. at 2830 (holding that redistricting plan may satisfy section 5 of Voting Rights Act and still be "enjoined as unconstitutional").

[12] Holder v. Hall, ___ U.S. ___, 114 S. Ct. 2581, 2598 (1994) (Thomas, J., concurring). Justice Thomas, joined by Justice Scalia, argued that recent voting

launched a counterrevolution which threatens to overthrow the gains in minority office holding so laboriously accumulated over the past 30 years.

II. VOTE DILUTION; A VOLATILE JURISPRUDENCE

The modern progression in minority office holding—one of sustained, incremental increases—suggests that the development of minority voting rights jurisprudence has also been linear and stable.[13] However, upon closer examination of this progression, it is apparent that the process has been disjunctive, with stops, starts and sudden turns, reflecting great rifts in the Court as to the appropriate standards for districting.

In *Fortson v. Dorsey*,[14] a case decided a few months before the passage of the Voting Rights Act, the Court rejected a challenge to county-wide voting for members of the Georgia Senate in several multi-district counties.[15] The Court stated that, while the electoral arrangements were not a *per se* violation of the Fourteenth Amendment, "multi-member constituency apportionment scheme[s]" could nevertheless be unconstitutional if they "designedly or otherwise . . . operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population."[16]

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rights decisions have resulted in a systematical "scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race." *Holder*, 114 S. Ct. at 2598-99. Justice Stevens, joined by Justices Blackmun, Souter, and Ginsburg, denounced Justice Thomas' view as "radical" and a direct retreat from *stare decisis*. *Id.* at 2628-29 (Stevens, J., dissenting).

[13] *See* NATIONAL ROSTER, *supra* note 4, at xxiii Table 1 (showing that number of black office holders has steadily increased since 1965 from 1469 in 1970 to 3503 in 1975 to 4912 in 1980 to 6056 in 1985 to 7370 in 1990).

[14] 379 U.S. 433 (1965).

[15] *Fortson*, 379 U.S. at 438-39. The county-wide voting scheme was challenged as a violation of the Fourteenth Amendment's Equal Protection Clause rather than a challenge based on an unconstitutional dilution of minority voting strength. *Id.* at 435. More specifically, the county-wide scheme was challenged as unconstitutional on the ground that "voting in the seven multi-district counties result[ed] in denying the residents therein a vote 'approximately equal in weight to that of' voters resident in the single-member constituencies." *Id.* at 436-37.

[16] *Id.* at 439. However, since this issue was not raised before the Court, the

The Court subsequently cited the reasoning of *Fortson v. Dorsey* in a number of cases[17] but ultimately rejected it in the case of *Whitcomb v. Chavis*.[18] In *Whitcomb*, the district court invalidated under the Fourteenth Amendment a multi-member legislative district in Marion County, Indiana because few blacks had been elected to office.[19] In a six to three decision, the Supreme Court reversed, holding that "[t]he voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls."[20] The Court indicated, however, that the outcome might have been different had plaintiffs produced evidence that minorities had been "denied access to the political system."[21] The Court equated this with denial of the right to register to vote or to participate in party affairs.[22] Thus, vote dilution litigation after *Whitcomb* seemed all but foreclosed.

Court refused to decide the constitutionality of such schemes challenged on the grounds of diluting minority voting strength. *Id.*

[17] *See* Abate v. Mundt, 403 U.S. 182, 184 n.2 (1971) (noting that petitioners failed to show that multi-member districts "operate to impair the voting strength of particular racial or political elements of the . . . voting population"); Burns v. Richardson, 384 U.S. 73, 88 (1966) (stating that multi-member districts would be unconstitutional if they had "invidious effect").

[18] 403 U.S. 124 (1971).

[19] *Whitcomb*, 403 U.S. at 131, 148-49. The district court, convening in the form of a three-judge panel, held that the county's "multi-member district must be disestablished and, because of population disparities not directly related to the phenomena alleged in the complaint, the entire State must be redistricted." *Id.* at 131. The district court found that the voting power of a particular residential area of blacks, referred to as the ghetto, had been diluted by a multi-member legislative districting scheme and that as a result the black residents were proportionally underrepresented. *Id.* at 131-33.

[20] *Id.* at 153. According to the Court, the issue in *Whitcomb* was whether minorities were denied equal protection simply because their candidates "los[t] too many elections." *Id.*

[21] *Id.* at 155. Contrarily, the Court found that there was no indication that the ghetto voters were "denied access to the political system" and further held that "[t]he mere fact that one interest group or another concerned with the outcome of . . . [c]ounty elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies." *Id.* at 154-55.

[22] *Id.* at 149.

In *White v. Regester*,[23] decided two years later, the Court revisited the issue of vote dilution and, for the first time, invalidated a multi-member legislative redistricting plan on the grounds that it discriminated against minorities in violation of the Fourteenth Amendment.[24] Justice White, author of the majority opinion in *Whitcomb*, writing for a unanimous Court, stated that multi-seat legislative districts in Texas were unconstitutional because they submerged black and Mexican-American voting strength.[25] The plaintiffs based their vote dilution claims on a variety of factors and not simply the defeat of minority candidates, *e.g.*, a history of discrimination, cultural and language barriers, depressed voter registration, the existence of a racially exclusive slating group, racial campaign tactics, and numbered post and majority vote requirements.[26] Taking into account the "totality of the circumstances" and the "cultural and economic realities" of the effects of at-large voting on minorities,[27] the Court held that minorities "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[28] The Court also affirmed the district court's finding that single-member districts were necessary "to bring the [minority] community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities."[29]

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[23] 412 U.S. 755 (1973), *vacated*, 422 U.S. 935 (1975).

[24] *White*, 412 U.S. at 765, 767. The Court held that although multi-member districts were not *per se* unconstitutional, it had traditionally recognized claims that such districts were "being used invidiously to cancel out or minimize the voting strength of racial groups." *Id.* at 765.

[25] *Id.* at 767, 769. The *White* Court extended to Mexican-Americans the status of "an identifiable class for Fourteenth Amendment purposes" in determining whether they were invidiously discriminated against. *Id.* at 767.

[26] *Id.* at 768-69.

[27] *Id.* at 769.

[28] *Id.* at 766 (citing Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971)). The Court also stated that the plaintiff class challenging a redistricting scheme bears the "burden . . . to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question." *Id.* (citing *Whitcomb*, 403 U.S. at 149-50).

[29] *White*, 412 U.S. at 769. Reiterating its previous view in *Whitcomb*, the

In *Zimmer v. McKeithen*,[30] the old Fifth Circuit Court of Appeals (comprising the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas), where the majority of vote dilution cases arose during the 1970s, formalized the *totality of the circumstances* approach.[31] The court of appeals identified four primary factors probative of vote dilution: (1) lack of access to candidate slating; (2) unresponsiveness; (3) a tenuous state policy underlying the challenged practice; and (4) the existence of past discrimination that precluded effective minority political participation.[32] Vote dilution could be shown by proof of an aggregate of the *Zimmer* factors, but no particular factor or number of factors had to be proven.[33]

In *Washington v. Davis*,[34] the Court held that proof of a racially discriminatory purpose was a necessary element of an employment discrimination claim under the Fourteenth Amendment.[35] Subsequently, in *Nevett v. Sides*,[36] the Fifth Circuit held that plaintiffs in a vote dilution case must similarly show that a challenged practice was purposefully discriminatory.[37] However, *Nevett* did not change a plaintiff's

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Court stated that "not . . . every racial or political group has a constitutional right to be represented in the state legislature," but the Court did hold that multimember districts, correctly designed and operated, may "invidiously exclude[] [minorities] from effective participation in political life." *Id.*

[30] 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

[31] *Zimmer*, 485 F.2d at 1305.

[32] *Id.* The court of appeals identified four additional factors where proof of vote dilution "is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Id.*

[33] *See* Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (5th Cir.) (en banc) (stating that proof of *Zimmer* factors can be indicative of particular group being denied access to political process), *cert. denied*, 434 U.S. 968 (1977); Wallace v. House, 515 F.2d 619, 630 (5th Cir. 1975) (asserting that in such cases, court must consider facts of situation at hand as well as history of neglect by elected representatives), *vacated*, 425 U.S. 947 (1976).

[34] 426 U.S. 229 (1976).

[35] *Washington*, 426 U.S. at 239. The Court held that the mere fact a law or act has a racially disproportionate impact does not make it unconstitutional unless the racially disproportionate impact of the law or act was also the result of a racially discriminatory purpose. *Id.*

[36] 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

[37] *Nevett*, 571 F.2d at 217-18. The Fifth Circuit, in *Nevett*, addressed a vote

burden of proof,[38] for the court held that a finding of dilution under the *Zimmer* "criteria satisfies the intent requirement of *Washington v. Davis*."[39]

White and *Zimmer*, with their focus upon the effects of a challenged electoral structure, became the applicable standards in vote dilution cases and resulted in the creation of majority-minority election districts throughout the South and other parts of the country.[40] However, in *City of Mobile v. Bolden*,[41] the Court abruptly shifted its analysis in vote dilution cases once again.

In *Bolden*, a divided Court held that blacks challenging an at-large electoral system for the election of city commissioners had to show not simply that their voting strength was diluted,[42] but that the system was established or was being

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dilution claim that challenged a legislative scheme providing for the establishment of at-large districts as having a racially discriminatory effect. *Id.* at 218.

[38] *Id.* at 217. The court held that the burden of proof in a vote dilution case requires the plaintiff to show that the legislative districting plan, whether it be an at-large plan or some other form of plan diluting minority voting strength, is "racially motivated." *Id.*

[39] *Id.*

[40] *See Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, & H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1205-26 (1982) [hereinafter *Hearings*] (statement of Frank Parker, Director, Voting Rights Project, Lawyers Comm. for Civil Rights Under Law) (summarizing 23 cases of vote dilution decided prior to 1978). Some courts rejected the concept of "proportionality" based on race in devising remedial districting plans. *E.g.*, Marshall v. Edwards, 582 F.2d 927, 936 (5th Cir. 1978), *cert. denied sub nom.* East Carroll Parish Police Jury v. Marshall, 442 U.S. 909 (1979). However, most courts concluded that it would be both pointless and unconstitutional to adopt remedial plans that did not cure the effects of racial bloc voting. *See* Kirksey v. Board of Supervisors, 554 F.2d 139, 149 (5th Cir.) (en banc) (rejecting plan which fragmented black population of Hinds County, Mississippi so that no supervisorial district contained majority of voting age blacks), *cert. denied*, 434 U.S. 968 (1977). The Fifth Circuit held that the district court "as a matter of its remedy-fashioning power . . . could not approve a plan which tended to carry forward into the future the long-lived denial of black access to the political process." *Kirksey*, 554 F.2d at 152. The Fifth Circuit also rejected the argument that the creation of majority-black districts would be a "racial gerrymander." *Id.* at 151 (citing United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165 (1977)).

[41] 446 U.S. 55 (1980).

[42] *Bolden*, 446 U.S. at 66. The mere fact that the challenging minority group

maintained with a racially discriminatory purpose.[43] The Court further held that proof of the *Zimmer* factors was "most assuredly insufficient to prove an unconstitutionally discriminatory purpose."[44] The decision in *Bolden* effectively took voting rights back to the days of *Whitcomb v. Chavis*.[45]

Congress, at the urging of the minority and civil rights communities, responded to *Bolden* in 1982 by amending section 2 of the Voting Rights Act to restore the "results," or totality of circumstances, test of *White v. Regester*.[46] Congres-

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has not been proportionately represented is not enough to establish a violation of the Fourteenth Amendment. *Id.*; *see also* White v. Regester 412 U.S. 755, 765-66 (1973) (stating that lack of proportionate representation is not enough to establish Fourteenth Amendment violation), *vacated*, 422 U.S. 935 (1975); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) (holding absence of proportionate representation to be insufficient grounds for Fourteenth Amendment claim).

[43] *Bolden*, 446 U.S. at 66. The *Bolden* Court determined that the burden was on the plaintiff to establish discriminatory purpose under the Fourteenth Amendment of the Constitution. *Id.* (citing *Whitcomb*, 403 U.S. at 149).

[44] *Id.* at 73. Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart and Powell, had previously criticized *Zimmer* as a "highly amorphous theory" that should not "be applied to municipal governments." Wise v. Lipscomb, 437 U.S. 535, 550 (1978) (Rehnquist, J., concurring).

[45] *See* Whitcomb, 403 U.S. at 124 (dealing with voting rights pre-*Zimmer*). In *Jones v. City of Lubbock*, Judge Goldberg stated that "the [*Bolden*] Court . . . completely changed the mode of assessing the legality of electoral schemes alleged to discriminate against a class of citizens." Jones v. City of Lubbock, 640 F.2d 777, 777 (5th Cir. Unit A Mar. 1981) (per curiam) (Goldberg, J., concurring). Judge Goldberg sharply criticized the decision for failing to articulate "the proper test to be employed in assessing the legality of an electoral system." *Jones*, 640 F.2d at 778 (Goldberg, J., concurring). Judge Goldberg also stated that by rejecting *White* and *Zimmer*, the Supreme Court was "casting aside the ten years of thought, experience and struggle embodied within it." *Id.* at 777 (Goldberg, J., concurring).

[46] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)); *see* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (stating amendment was response to *Bolden* and that "results test" was again relevant). The legislative history indicated that "a variety of factors, depending upon the kind of rule, practice, or procedure called into question[,]" were relevant in determining a violation. S. REP. NO. 417, 97th Cong., 2d Sess. 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206. Some typical factors identified in Senate Report 417 include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democrat-

sional critics of the amendment charged that the results standard had "no core value . . . other than election results" and that the absence of proportional minority representation would be enough to invalidate existing at-large systems.[47] The Reagan administration also opposed the amendment of section 2.[48] Despite this opposition, Congress passed the amendment by overwhelming majorities in both houses.[49]

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ic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 28-29; *see also* Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 751-64 (1983) (discussing factors of "results" test).

[47] S. REP. NO. 417, *supra* note 46, at 96-97, *reprinted in* 1982 U.S.C.C.A.N. at 269-70 (views of Sen. Hatch). Senator John P. East, a Republican from North Carolina, expressed views similar to those of Senator Hatch and opposed passage of the amendments. *Id.* at 239.

[48] *Hearings*, *supra* note 40, at 77 (testimony of Att'y Gen. William F. Smith). Attorney General Smith testified that the "amendment to section 2 [was] just bad legislation." *Id.* at 78 (testimony of Att'y Gen. William F. Smith). Assistant Attorney General Reynolds stated that the "'effects' test in section 2 threatens to undermine a basic principle of our democratic system of Government." *Id.* at 1662 (testimony of Asst. Att'y Gen. William B. Reynolds).

[49] 128 CONG. REC. 14,940 (1982) (recording motion to concur in Senate Amendments passed unanimously); 128 CONG. REC. 14,337 (1982) (recording 85 years, 8 nays, and 7 not voting in Senate); 127 CONG. REC. 23,205 (1981) (recording 389 years, 24 noes, and 20 not voting in House). According to Senate Report 417, the intent standard was "unnecessarily divisive" because it required plaintiffs to prove that local officials were racists, the burden of proof was "inordinately difficult," and it "asks the wrong question." S. REP. NO. 417, *supra* note 46, at 36, *reprinted in* 1982 U.S.C.C.A.N. at 214. The "right" question was whether minor-

Two days after the amendment of section 2, the Supreme Court, continuing to reflect deep division and ambivalence in the area of minority voting rights, substantially retreated from its decision in *Bolden*. In *Rogers v. Lodge*,[50] a case from Burke County, Georgia with facts similar to those in *Bolden*, the Court held that while a constitutional violation required a racial purpose, the Court could infer a racial purpose from the discriminatory effect of a challenged voting practice.[51] The Court for all practical purposes restored the test from *White v. Regester* in Fourteenth Amendment cases.[52]

In *Thornburg v. Gingles*,[53] the Supreme Court decided its first case under the 1982 Voting Rights Act amendments[54] and greatly simplified the test for minority vote dilution.[55] A

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ities had a "fair opportunity" to participate in the political process. *Id.*

[50] 458 U.S. 613 (1982).

[51] *Rogers*, 458 U.S. at 618. The *Rogers* Court stated that "discriminatory intent need not be proved by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts.'" *Id.* (quoting Washington v. Davis, 426 U.S. 229, 242 (1981)).

[52] *See* Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* MINORITY VOTE DILUTION 145, 160-61 (Chandler Davidson ed., 1984) (discussing reasoning of *Rogers* Court). Given the similarities of their facts, *Bolden* and *Rogers* can best be understood as reflecting changes in the membership of the Court and the position of the Chief Justice. *Id.* at 161. Justice Stewart, who wrote the plurality opinion in *Bolden*, had been replaced by Justice O'Connor, who voted with the majority in *Rogers*. *Id.* Chief Justice Burger, "stung by nationwide criticism of the [*Bolden*] decision," voted in favor of the Burke County plaintiffs. *Id.* The decision in *Rogers* is mainly academic, for virtually all vote dilution cases, in keeping with the Court's intention to avoid unnecessary constitutional decisions, are decided on section 2 rather than constitutional grounds. Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam). The Court in *Escambia County* stated that "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County*, 466 U.S. at 51 (citing Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

[53] 478 U.S. 30 (1986).

[54] *Gingles*, 478 U.S. at 34. The specific issue before the Court was whether the use of multimember districts "violated § 2 by impairing the opportunity of black voters 'to participate in the political process and to elect representatives of their choice'." *Id.* (quoting Voting Rights Act Amendments of 1982 § 3, 42 U.S.C. § 1973(b) (1988)).

[55] *Id.* at 48 n.15. The Court discussed the factors set out in Senate Report

majority of the Court held that in order for a section 2 violation to be established the "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district[,] . . . politically cohesive, [and] . . . the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[56] As for the other factors enumerated in Senate Report 417, they were deemed "supportive of, but *not essential to*, a minority voter's claim."[57] Subsequently, in *Johnson v. De Grandy*,[58] the Court recast the three *Gingles* factors more firmly as "'necessary preconditions'"[59] and held that the ultimate determination of vote dilution must be based on "the totality of circumstances . . . without isolating any . . . arguably relevant facts from the act of judgment."[60]

Gingles brought both simplicity and predictability to vote dilution challenges. By focusing primarily on demographic data to determine geographic compactness and election returns to determine political cohesion and the significance of racial bloc voting, the Court placed vote dilution challenges on an evidentiary footing similar to that of the one person, one vote cases and blunted the criticism that section 2 was an amorphous concept that lacked a core value.[61] The Court also

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417 and concluded that in order for § 2 plaintiffs to be awarded relief they must simply prove that they "experience substantial difficulty electing representatives of their choice." *Id.*

[56] *Id.* at 50-51. Justice O'Connor pointed out in her concurring opinion that this was basically the formulation rejected by the Court in *Whitcomb v. Chavis*. *Id.* at 98-99 (O'Connor, J., concurring).

[57] *Id.* at 49 n.15. The Court observed that Senate Report 417 weighed past election results and racial polarization as the most important factors in vote dilution cases. *Id.* at 48-49 n.15 (citing S. REP. NO. 417, *supra* note 46, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206).

[58] ____ U.S. ____, 114 S. Ct. 2647 (1994).

[59] *Johnson*, 114 S. Ct. at 2657 (quoting *Gingles*, 478 U.S. at 50). Without the presence of these familiar factors, a plaintiff class cannot establish minority "vote dilution by use of a multimember district." *Id.*

[60] *Id.* The *Johnson* Court determined that the "proportionality" of minority voting districts to voting age minorities was relevant to a "totality of circumstances" challenge to a single-member voter district. *Id.* at 2663.

[61] *See, e.g.*, *Johnson*, 114 S. Ct. at 2658-59 (focusing on demographic data to

set a clear standard for states to follow in their congressional and legislative redistricting following the decennial census.

III. 1990 REDISTRICTING; SHAW AND MILLER

Under the guiding principles of *Gingles* and section 5 preclearance, the 1990 redistricting, from the point of view of minorities, was the most successful in the nation's history. New majority-black congressional districts were created in Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Maryland, New York, Pennsylvania, Louisiana, and Texas.[62] Similar increases in the number of majority-minority legislative districts resulted in a corresponding increase in the number of black state senators and house members.[63]

Despite, or because of, its success, the 1990 congressional redistricting was systematically attacked. White voters filed challenges in numerous states claiming that the 1990 congressional redistricting plans containing majority-black districts were "racial gerrymander[s]."[64]

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satisfy "necessary preconditions" of vote dilution cases). In Georgia, for example, more than 80% of all lawsuits filed, challenging at-large systems between 1982 and 1990, were settled due to the clear understanding of vote dilution standards. *See* Laughlin McDonald et al., *Georgia*, *in* QUIET REVOLUTION, *supra* note 5, at 67 Tables 3.Z & 3.Z-A (on file with the *Mississippi Law Journal*) (listing all cases challenging at-large city and county elections in Georgia).

[62] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Number of Congressional Districts with Black or Hispanic Majorities Doubles, Census Bureau Says*, U.S. DEP'T OF COMMERCE NEWS Mar. 24, 1993, at 2 [hereinafter CENSUS BUREAU]; *Black-and Hispanic-Majority Districts*, 51 CONG. Q. WKLY. REP. 1829 (July 10, 1993). The Census Bureau reported that "[i]n all, 16 new Black majority districts were created for the 103rd Congress." CENSUS BUREAU, *supra* at 2.

[63] David A. Bositis, *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South*, (Joint Center for Political & Economic Studies, Washington, D.C.) 1995, at 46-47. In the South, the number of black state senators increased from 43 to 67, and the number of black house members increased from 159 to 213. *Id.*

[64] *See* Miller v. Johnson, ___ U.S. ___, 115 S. Ct. 2475, 2485 (1995) (attacking Georgia congressional districts as "racial gerrymander[s]"); Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2832 (1993) (attacking North Carolina congressional districts as segregated); Diaz v. Silver, No. CV-95-2591 (DGT), 1995 WL 761845, at *1 (E.D.N.Y. Dec. 18, 1995) (questioning New York congressional districts); PAC for Middle Am. v. State Bd. of Elections, No. 95 C 827, 1995 WL 571893, at

The first of such cases to reach the Supreme Court was *Shaw v. Reno*. In *Shaw*, the district court dismissed the complaint for failure to state an equal protection claim.[65] The district court held that creating two majority-black congressional districts to comply with the Voting Rights Act was not, as alleged, *per se* unconstitutional, and that plaintiffs failed to claim or prove that the challenged plan minimized or unfairly canceled out white voting strength.[66]

In reversing the district court's holding, the Supreme Court held that in order to establish a constitutional claim and invoke strict scrutiny a plaintiff had to show that a challenged redistricting plan was "bizarre" or "irrational" on its face,[67] resulted in a pattern "'unexplainable on grounds other

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*1 (N.D. Ill. Sept. 22, 1995) (challenging Illinois congressional districts); Vera v. Richards, 861 F. Supp. 1304, 1309 (S.D. Tex. 1994) (attacking 24 Texas congressional districts as "product of racial gerrymandering"), *prob. juris. noted sub nom.* Bush v. Vera, ___ U.S. ___, 115 S. Ct. 2639 (1995). The Court has defined a gerrymander as an electoral arrangement that denies or "degrade[s] a voter's or a group of voters' influence on the political process as a whole." Davis v. Bandemer, 478 U.S. 109, 132 (1986). Since all districting advances the interests of some voters at the expense of others, one leading expert has said that "[a]ll districting is 'gerrymandering'." ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968).

[65] Shaw v. Barr, 808 F. Supp. 461, 472-73 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2832 (1993).

[66] Shaw v. Barr, 808 F. Supp. at 472-73 (citing United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165 (1977)). The district court found the plaintiffs' claim to raise "questions about the political and social wisdom of the North Carolina congressional redistricting plan's creation of two tortuously configured black-majority districts," but such questions were political and failed to establish constitutional merit. *Id.* at 473. However, the district court held that its decision did not mean that a "'reverse discrimination' vote-dilution case may never lie against any state redistricting plan," but that "plaintiffs asserting such a claim must establish the requisite discriminatory purpose and effect upon them as individuals or a cognizable group that is required by constitutional voting rights jurisprudence." *Id.*

[67] *Shaw*, 113 S. Ct. at 2825, 2832. The Court's reliance on this "bizzare on its face" criteria in a congressional redistricting challenge evolved from previous constitutional challenges of voting rights legislation. *See* Guinn v. United States, 238 U.S. 347, 363 (1915) (invalidating statute under Fifteenth Amendment that imposed literacy requirement on voters because statute on its face "embod[ied] no exercise of judgment and rest[ed] upon no discernible reason"). The Court applied almost identical reasoning in *Gomillion v. Lightfoot* to invalidate, on Fifteenth Amendment grounds, a twenty-eight sided municipal boundary line as an uncon-

than race,'"[68] and that the *only* possible explanation for the plan was to "segregate" the races for purposes of voting.[69] Bizarre shape, race consciousness, and harm appeared to be the essential predicates for a claim under *Shaw*. Thus, by its terms, the decision applied only to the "rare" and "exceptional cases."[70]

However, *Miller v. Johnson* went far beyond *Shaw* to hold that a bizarrely shaped district was not a prerequisite for a constitutional challenge but was simply one way of proving a suspect racial purpose.[71] The Court stated that a plaintiff could establish "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[72] The Court ultimately held that Georgia's Eleventh Congressional District, which was drawn to comply with a section 5 objection by the Attorney General, did not further a compelling state interest because the objection "was not required by the Voting Rights Act under a correct reading of the

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stitutional deprivation of black voters' right to vote. Gomillion v. Lightfoot, 364 U.S. 339, 348 (1960). Although the redistricting plan in *Shaw* was race-neutral on its face, the plan's effect "was impermissibly to remove from the city virtually all black voters and no white voters," thus satisfying the "bizarre on its face" criteria. *Shaw*, 113 S. Ct. at 2825.

[68] *Shaw*, 113 S. Ct. at 2825 (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). The *Arlington Heights* Court held that when such a pattern exists "[t]he evidentiary inquiry is . . . relatively easy." *Village of Arlington Heights*, 429 U.S. at 266.

[69] *Shaw*, 113 S. Ct. at 2832.

[70] *Id.* at 2825-26. Commentators have interpreted *Shaw* as an "exceptional doctrine for aberrational contexts rather than as a prelude to a sweeping constitutional condemnation of race-conscious redistricting." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 495 (1993).

[71] Miller v. Johnson, ___ U.S. ___, 115 S. Ct. 2475, 2486-87 (1995).

[72] *Miller*, 115 S. Ct. at 2488. One member of the Court explained that the plaintiff's burden was to "show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 2497 (O'Connor, J., concurring).

statute."[73] According to the Court, the Attorney General's incorrect reading was one of "black-maximization."[74]

The *Miller* decision created substantial confusion in determining the extent to which it would be permissible to take into account race as a factor when redrawing a district. A legislature may properly "be aware of racial demographics," but it may not allow race to predominate in the redistricting process.[75] A state "is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."[76] The Court itself acknowledged that it may be difficult to make and apply such distinctions.[77]

Virtually all of the existing redistricting plans in the South are arguably subject to strict judicial scrutiny under a broad reading of *Miller* because race was a factor in their construction.[78] Many of the existing state congressional redistricting plans have placed considerable weight on race in cre-

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[73] *Id.* at 2491. The Court refused to "accept the government's mere assertion that the remedial action [was] required" and held that "a strong basis in evidence of the harm being remedied" was required. *Id.*

[74] *Id.*

[75] *Id.* at 2488. It is difficult to distinguish between being motivated by racial considerations and being aware of them. *Id.*

[76] *Id.* at 2490. According to one voting rights expert, the Court has acted "terribly irresponsibly. They haven't offered any safe harbor. There is nothing you can do in redistricting now that can keep you from getting sued." Holly Idelson, *It's Back to Drawing Board on Minority Districts*, 53 CONG. Q. WKLY. REP. 3065, 3065 (Oct. 7, 1995) (quoting Samuel Issacharoff).

[77] *Miller*, 115 S. Ct. at 2488. That difficulty is evident from the division among the members of the Court. While five Justices found a violation, four Justices concluded that "[t]he record before us does not show that race . . . overwhelmed traditional districting practices in Georgia," and that the Eleventh District "reflects significant consideration of 'traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons.'" *Id.* at 2502-03 (Ginsburg, J., dissenting) (quoting Johnson v. Miller, 864 F. Supp. 1354, 1397 n.5 (S.D. Ga. 1994) (Edmondson, J., dissenting), *aff'd*, ___ U.S. ___, 115 S. Ct. 2475 (1995)).

[78] *Id.* at 2487. Strict scrutiny is the applicable judicial standard for "statutes . . . under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Id.* (citing Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2825 (1993)).

ating majority-minority districts for purposes of: (1) remedying section 2 violations; (2) settling section 2 vote dilution lawsuits; (3) resolving the Attorney General's section 5 objections; (4) complying with the Voting Rights Act; or (5) insuring equal electoral opportunities for minorities in the affected legislative districts.[79] *Miller* threatens to have a profound and negative impact on minority office holding.[80]

IV. Mistaken Assumptions about Apartheid and Segregation

In striking down Georgia's Eleventh Congressional District, the district court in *Miller* did not find that the voting strength of white voters was diluted or that they were personally harmed.[81] Specifically, the district court stated that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters."[82] The Supreme Court did not disturb these

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[79] Brief Amicus Curiae of American Civil Liberties Union and ACLU of Louisiana in Support of Appellants at 4-17, United States v. Hays, ____ U.S. ____, 115 S. Ct. 2431 (1995) (Nos. 94-558, 94-627); *see also* QUIET REVOLUTION, *supra* note 5, at 38-298 (discussing congressional, legislative, and local redistricting in detail in state chapters).

[80] That impact is strongly evident in Georgia where, on remand, the three-judge district court, on motion of the plaintiffs, invalidated the state's majority-black Second Congressional District. Johnson v. Miller, No. CV 194-008, 1995 WL 783038, at *1 (S.D. Ga. Dec. 13, 1995). In response to *Miller* and in the absence of any judicial challenge or finding of unconstitutionality, the state passed new redistricting plans deconstructing nine formerly majority-black state house districts and two majority-black state senate districts. 141 CONG. REC. H8802 (daily ed. Sept. 12, 1995) (statement of Rep. McKinney).

[81] *See* Johnson v. Miller, 864 F. Supp. 1354, 1370 (S.D. Ga. 1994) (finding no personal injury), *aff'd*, ____ U.S. ____, 115 S. Ct. 2475 (1995).

[82] *Johnson*, 864 F. Supp. at 1370. In *Hays v. Louisiana*, even though the court struck down the majority-black Fourth Congressional District in Louisiana, one member of the court went so far as to acknowledge "the great benefits that are derived by an increase in minority representation in government." Hays v. Louisiana, 862 F. Supp. 119, 128 (1994) (Shaw, J., concurring), *vacated sub nom.* United States v. Hays, ____ U.S. ____, 115 S. Ct. 2431 (1995). Minorities, most of whom were elected from majority-black districts, "have shown that they perform admirably, . . . provide positive role models for all black citizens, [and] their efforts in government will insure that the legal obstacles to minority advancement in all areas of life will be eliminated." *Hays*, 862 F. Supp. at 128 (Shaw, J., con-

findings on appeal. Instead, the Court ruled that the constitutional injury resulted from the fact that "[r]ace was . . . the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations."[83] The Court asserted that whites were harmed by racial *stereotyping* in the redistricting process in that the risk of such classifications would "'balkanize [citizens] into competing racial factions'."[84]

Perhaps the greatest flaw in the analysis in *Miller* was the extent to which the majority ignored the evidence of discrimination and racial bloc voting in Georgia. No one familiar with the state's past and present history could ever conclude that race was a *stereotype* or that there was no racial polarization.[85] Race was so much a reality that the district court took judicial notice of it and ruled that evidence of discrimination "against black people in the State of Georgia need not be presented for purposes of this case."[86] Thus, the assumptions made by the majority in *Miller* about *stereotyping* are simply false.

Assumptions aside, the highly integrated majority-minori-

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curring).

[83] Miller v. Johnson, ___ U.S. ___, 115 S. Ct. 2475, 2490 (1995). Since race was the single most important criteria used by the state legislature, the Court stated that "Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Miller*, 115 S. Ct. at 2490.

[84] *Id.* at 2486 (quoting Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2832 (1993)). However, several members of the Court had already rejected this very notion in *United Jewish Organizations, Inc. v. Carey* by noting that the deliberate use of race during the redistricting process represented "no racial slur or stigma with respect to whites or any other race." United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 165 (1977).

[85] Justice Ginsburg made extensive reference to the denial of "equal voting rights" in Georgia in her dissenting opinion. *Miller*, 115 S. Ct. at 2500 (Ginsburg, J., dissenting). Because of Georgia's past and present history of race relations, Justice Ginsburg stated "the fact that the Georgia General Assembly took account of race in drawing district lines . . . [did] not render the State's plan invalid." *Id.* (Ginsburg, J., dissenting).

[86] Trial Transcript, Volume V, at 142, Johnson v. Miller, 1995 WL 783038 (S.D. Ga. Dec. 13, 1995) (No. CV 194-8).

ty districts in Georgia and in the South bear no resemblance to either apartheid or segregation. Retired Chief Judge Emeritus for the Third Circuit Court of Appeals A. Leon Higginbotham, Jr., in criticizing the Court's apartheid analogy in *Shaw*, wrote that "[a]nyone conversant with the origins and development of apartheid would be shocked with the Supreme Court's suggestion that the North Carolina plan resembles 'political apartheid'."[87] Notably, in striking down the majority-black Eleventh District in *Miller*, the Court omitted any reference to apartheid.

Furthermore, the majority-minority districts in the South are the most racially integrated districts in the country, containing an average of forty-five percent non-black voters.[88] As Judge Higginbotham noted, it is both naive and irrational to describe a district as "segregated" merely because it is more than fifty percent black,[89] or to equate such a district "with the oppressional of racial segregation that America sanctioned for decades.[90]

The evidence also indicates that integrated majority-minority districts, far from balkanizing society, have dampened racial bloc voting and promoted a "politics of commonality."[91] One veteran observer, commenting upon the increased willing-

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[87] A. Leon Higginbotham, Jr. et al., Shaw v. Reno*: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1625 (1994) (quoting Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993)).

[88] Bositis, *supra* note 63, at 28. Justice Stevens and Justice Ginsburg recognized in *Miller* that Georgia's congressional redistricting plan was a form of "racial integration," *Miller*, 115 S. Ct. at 2498 (Stevens, J., dissenting), designed to insure the inclusion of blacks in the political process, *id.* at 2500 (Ginsburg, J., dissenting).

[89] Higginbotham et al., *supra* note 87, at 1632. However, Judge Higginbotham did note that many courts have recognized that "white flight is precipitated by the perception by whites of 'over integration'" when blacks comprise "more than 33% of a neighborhood's population." *Id.* at 1632 n.194 (citing Burney v. Housing Auth. of Beaver, 551 F. Supp. 746, 766 (W.D. Pa. 1982)).

[90] *Id.* at 1632.

[91] *See* David T. Canon, *Redistricting and the Congressional Black Caucus*, 23 AM. POL. Q. 159, 160-61 (1995) (analyzing roll call votes and concluding that "newly elected African Americans in Congress are more likely to promote a politics of commonality than a politics of difference").

ness of whites to vote for a black candidate in the racially integrated Second Congressional District in Mississippi, suggested that "the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society, and promotes a political system in which race does not matter as much as it did before."[92]

Whites are also frequently elected from majority-minority districts. In the 1980s, white candidates in seven southern states won in twenty-three percent of the majority-black House districts and in thirty-eight percent of the majority-black Senate districts.[93] Clearly, highly integrated majority-minority districts cannot be dismissed pejoratively as segregated seats for minorities.

V. ORIGINS OF THE COUNTERREVOLUTION

The change in the Court's composition through the 1980s and early 1990s formed a new majority[94] with increased hostility towards affirmative action which played a major role in the radical shift in vote dilution law embodied in *Shaw* and *Miller*.[95] The long time critics of minority voting rights[96] also

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[92] Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1, 19-20 (1995).

[93] *See* Handley & Grofman, *supra* note 5, at 336 (stating that black officials were elected in 77% of majority-black districts in 1980s). The seven states included Alabama, Georgia, Louisiana, Mississippi, North Carolina (senate only), South Carolina, and Virginia. *Id.*

[94] In *Rogers v. Lodge*, the majority included Justices White, Brennan, Marshall, Blackmun, O'Connor, and Chief Justice Burger. Rogers v. Lodge, 458 U.S. 613, 614 (1982). In comparison, the majority in *Shaw v. Reno* consisted of Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist. Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2819 (1993).

[95] The Court's growing hostility toward affirmative action was apparent in decisions decided earlier in the 1994 Term. *See* Adarand Constructors, Inc. v. Pena, ___ U.S. ___, 115 S. Ct. 2097, 2113 (1995) (subjecting "all racial classifications, imposed by whatever federal, state, or local governmental actor" to strict scrutiny by overruling Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)); Missouri v. Jenkins, ___ U.S. ___, 115 S. Ct. 2038, 2065 (1995) (Thomas, J., concurring) (opining that Equal Protection Clause analysis requires citizens to be treated as

gained new allies and new arguments during the 1990s round of redistricting which undoubtedly influenced public opinion in opposition to majority-minority districts.

A. A Partisan Conspiracy?

White Democrats and members of the media charged that Republicans were systematically and cynically exploiting the Voting Rights Act by promoting the creation of majority-minority districts simply because the by-product consisted of predominantly white, Republican districts.[97] They also accused the Republican controlled Department of Justice of

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individuals thus subjecting "all racial classifications to the strictest of scrutiny"). The majority in *Miller* drew heavily on the affirmative action cases in concluding that Georgia's congressional redistricting was subject to strict scrutiny. Miller v. Johnson, ___ U.S. ___, 115 S. Ct. 2475, 2490-94 (1995). *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510-11 (1989) (invalidating municipal projects set aside for minority contractors as violative of Equal Protection Clause); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (invalidating teacher layoff provisions of affirmative action agreement). The application of these affirmative action cases in *Miller* blurred the distinction between the race conscious allocation of scarce employment or contractual opportunities and redistricting, one of the essential purposes of which is to "reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups." Davis v. Bandemer, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring); *see also* City of Mobile v. Bolden, 446 U.S. 55, 87 (1980) (Stevens, J., concurring) (stating that "legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way").

[96] *See, e.g.*, ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 5 (1987) (criticizing Voting Rights Act and subsequent amendments as providing black candidates "special protection from white competition"). Thernstrom has always found the Voting Rights Act problematic because she believes it is an "instrument for affirmative action, [and] a means to ensure ballots that promoted 'full' and 'effective' representation." *Id.* at 30.

[97] These charges were reported in publications as diverse as *The New Yorker* and the *Coastal Observer* (Pawley's Island, South Carolina, circulation 4,100). According to *The New Yorker*, the Republican National Committee adopted a strategy "to create new majority-black districts and new, presumably Republican, majority-white districts." Michael Kelly, *Segregation Anxiety*, THE NEW YORKER, Nov. 20, 1995, at 46, 48. The *Coastal Observer* described the Republican strategy as a "ploy to take control of Congress." Tania L. Carter, *Redistricting Case Chance to End Stereotypes, Lawyer Says*, COASTAL OBSERVER, Dec. 7, 1995, at 1, 3.

being an active participant in the partisan conspiracy.[98]

1. The Republican National Committee

Although the principal opposition to the 1982 amendments of the Voting Rights Act came from Republican members of Congress and the Reagan administration, the Republican party clearly adopted a strategy in the 1990s to increase the number of minority dominated congressional and legislative districts to further its own partisan goals.[99] However, the Republican efforts were no more sinister, nor less constitutionally protected, than similar efforts by Democrats or other political parties to advance their partisan interests.[100] In the area of redistricting, it would be especially naive to suppose that partisanship did not ordinarily play a role.[101] By linking the creation of integrated majority-minority districts to the Republican party, the opponents hoped to discredit it as a partisan conspiracy and deprive the initiative of its moral high ground and purpose to remedy discrimination.[102]

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[98] Carter, *supra* note 97, at 3.

[99] *See* Bositis, *supra* note 63, at 62 (stating "Republican strategists . . . have long viewed the creation of majority-minority districts in the South as an opportunity for the Republican party"). The Republican party viewed the creation of majority-minority districts as a way to locate more black, traditionally Democratic voters in majority-minority districts, thus allowing "the surrounding districts [to become] more competitive and hence vulnerable to Republican takeovers." *Id.* at 20.

[100] *See* Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (stating that First and Fourteenth Amendments protect citizens' "right to associate with the political party of one's choice"). The *Kusper* Court further stated that the "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper*, 414 U.S. at 56-57 (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).

[101] *See* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) (noting that "[p]olitics and political considerations are inseparable from districting and apportionment").

[102] A. Lee Parks, one of the lawyers for the plaintiffs in *Miller*, resorted to open partisan scare tactics in telling a group of some 80 people at a political fund raiser at Litchfield Beach and Golf Resort in South Carolina that majority-black districts were nothing more than a Republican plot to control Congress and state legislatures. Carter, *supra* note 97, at 3. Parks referred to majority-minority redistricting schemes as a "calculated political strategy" by the Republicans, and

Regardless of any influence the Republicans may have had on redistricting, Democrats had control of all the state legislatures in the South where majority-black districts were created in the 1990s.[103] At the state legislative level, Republicans simply lacked the control necessary to implement their redistricting initiatives.

2. *The Republican Justice Department*

While the Department of Justice had a substantial influence over the 1990 redistricting process,[104] there is little evidence which shows that the Department of Justice acted merely out of partisanship. Although the interests of the Justice Department and the Republican party may have been similar, the record of section 5 objections shows that the Department of Justice enforced the preclearance provisions of the Voting Rights Act in a manner that was consistent with congressional intent.[105]

Although the Court, in *Miller v. Johnson*, criticized the Department of Justice for enforcing the non-discrimination provisions of the Act *too* vigorously, the *Miller* Court did not accuse the Department of partisan bias.[106] Since blacks have a tendency to overwhelmingly vote Democratic,[107] it would

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said that "[i]f that does not frighten you, then you've lost touch with what America is all about." *Id.*

[103] *See* Bositis, *supra* note 63, at 46 (stating that Deep South states remained Democratic bastions during southern state legislative redistricting). However, after the 1994 elections, legislative control in three southern legislative bodies—the North Carolina and South Carolina state houses and the Florida state senate—shifted to the Republicans for the first time since Reconstruction. *Id.*

[104] Direct intervention by the Department of Justice lead to the creation of majority-black districts in Georgia, Miller v. Johnson, ____ U.S. ____, 115 S. Ct. 2475, 2490 (1995), and North Carolina, Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2820 (1993).

[105] *See* 28 C.F.R. §§ 51.51—51.61 (1995) (setting forth standards used by Attorney General in enforcing preclearance provisions of Voting Rights Act).

[106] *Miller*, 115 S. Ct. at 2491.

[107] *See* Bositis, *supra* note 63, at 54 (estimating that southern blacks voted Democratic at rate of 91% in 1994 congressional elections); Michael B. Binford, *Georgia: Political Realignment or Partisan Evolution*, *in* THE SOUTH'S NEW POLITICS: REALIGNMENT AND DEALIGNMENT 180 (Robert H. Swansbrough & David M.

make as much sense to say that by supporting the creation of majority-black districts the Department of Justice was actually promoting the election of Democrats.

The Department of Justice, under the current Democratic administration, has intervened in a number of the congressional redistricting challenges in defense of the existing districting plans.[108] One might argue that the present administration's defense of majority-minority districting is part of a continuing Republican conspiracy to destroy the Democratic party, but such a theory collapses under its own weight. The Department is defending the existing plans because it believes they were properly implemented under the Voting Rights Act.[109]

In any case, covered jurisdictions are *not* required to submit proposals to the Department of Justice under section 5. A jurisdiction can always seek *de novo* judicial preclearance of its voting practices by filing a declaratory judgment in the District Court for the District of Columbia.[110] Thus, the Department of Justice never has the last word in redistricting.

Brodsky eds., 1988) (stating that "[t]heir consistent Democratic support has made black voters an essential component of the Democratic coalition") [hereinafter THE SOUTH'S NEW POLITICS].

[108] *See, e.g.*, Bush v. Vera, ___ U.S. ___, 115 S. Ct. 2639 (1995) (intervening in Texas); *Miller*, 115 S. Ct. at 2475, 2483-84 (intervening in Georgia); United States v. Hays, ___ U.S. ___, 115 S. Ct. 2431, 2434 (1995) (intervening in Louisiana).

[109] In *Miller v. Johnson*, the Justice Department stated that Georgia's congressional redistricting "plan, including the Eleventh District, was narrowly tailored to further the State's compelling interests in complying with the Voting Rights Act and ameliorating the effect that historic discrimination and persistent racial polarization have on the opportunities of minority voters to elect the candidates of their choice." Brief for the United States at 28, Miller v. Johnson, ___ U.S. ___, 115 S. Ct. 2475 (1995) (No. 94-929).

[110] *See* Miller v. Johnson, 115 S. Ct. at 2504 (Ginsburg, J., dissenting) (commenting that State could have demanded "relief from the Department's objections by instituting a civil action in the United States District Court for the District of Columbia"); Allen v. State Bd. of Elections, 393 U.S. 544, 555 n.19 (1969) (stating that where state seeks declaratory judgment only "substantive questions necessary for approval . . . are litigated").

B. The Bad-for-Democrats Argument

It is an article of faith among some that, aside from the Republican conspiracy theory, the creation of majority-minority districts in fact caused the Democrats to lose control of Congress, a result that was particularly detrimental to blacks who overwhelmingly vote Democratic and are often shunned by Republicans.[111] However, the underlying premise of the argument is greatly overstated.

Democrats lost control of the U.S. Senate after the 1994 elections,[112] but since the Senate is elected statewide rather than from districts, congressional redistricting could not have logically been the cause of the Democratic losses. As for the House, most accounts place the actual political "cost" to Democrats of creating majority-minority districts between only one to thirteen seats.[113] Given the fact that Democrats lost a to-

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[111] One commentator has made the extravagant claim that the creation of majority-black districts triggered "the larger collapse of the Democratic Party in the South," which "has had an even larger impact" on the national Democratic party by providing the Republican party "with the power to dominate national politics and dictate national policy." Kelly, *supra* note 97, at 46, 48. None of the plaintiffs in *Shaw* or *Miller*, however, claimed that the creation of majority-black districts unconstitutionally impaired the influence of Democrats or any other party in the political process. Davis v. Bandemer, 478 U.S. 109, 132 (1986).

[112] After the 1994 elections there were 53 Republicans in the Senate. David A. Bositis, *African-Americans & the 1994 Midterms: What Happened?*, (Joint Center for Political & Economic Studies, Washington, D.C.) May 1995, at 14.

[113] *E.g.*, *id.* at 17 (stating that "the creation of majority-minority districts *per se* cost the Democrats comparatively few seats in the south, say 10 (of 125)"); David I. Lublin, Racial Redistricting and the New Republican Majority: A Critique of the NAACP Legal Defense Fund Report on the 1994 Congressional Elections 19 (1995) (unpublished manuscript, on file with the *Mississippi Law Journal*) (stating "Democrats lost around thirteen seats in 1994 due to racial redistricting"). As a result of the 1994 elections, the Republicans captured 230 seats in the House. Bositis, *supra* note 112, at 14.

Whatever actual trade-off there is between creating majority black districts and electing more Democrats can in any event often be minimized. In Georgia for example, following remand in *Miller v. Johnson*, the general assembly met in special session to redistrict Georgia's congressional districts. Mark Sherman & Ken Foskett, *Miller Calls Special Session to Redraw Georgia Districts State Must Get Permission of 3-Judge Federal Panel*, ATLANTA J. & CONST., July 7, 1995, at A1. Members of the general assembly introduced remedial plans that would have protected the three black incumbent Democrats *and* would have created three

tal of fifty-four House seats in 1994 and that twenty-four were in states where there are no majority-minority districts,[114] the party's loss of control of the House, and the Congress as a whole, cannot be laid at the door of majority-black congressional districts. The real causes for the decline in fortunes of the Democratic party must be found elsewhere.[115]

The problem for Democrats in 1994, particularly in the South, was the abandonment of the party by a substantial number of white voters. However, there is some disagreement among social scientists whether southern whites have realigned as Republicans or mainly dealigned as Democrats and become independents.[116] There is also disagreement over

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additional majority-white Democratic "opportunity districts." 141 CONG. REC. H9589 (daily ed. Sept. 27, 1995). However, even though the Democrats controlled both houses of the general assembly, the legislature deadlocked and adjourned without enacting a plan. Idelson, *supra* note 76, at 3067. Some white Democrats refused to join with black Democrats in support of a pro-Democratic/incumbent protection plan because they thought the party would damage itself among conservative whites by appearing to give in to black demands or because they had no commitment to protecting black Democratic incumbents. 141 CONG. REC. H9589 (daily ed. Sept. 27, 1995). The Democratic controlled senate's proposed plan to abolish two of the three majority-black congressional districts evidenced the division between white and black Democrats. 141 CONG. REC. H8800-01 (daily ed. Sept. 12, 1995) (statement of Rep. McKinney).

[114] NAACP Legal Defense & Educational Fund, The Effect of Section 2 of the Voting Rights Act on the 1994 Congressional Elections 2 (Nov. 30, 1994) (unpublished report, on file with the *Mississippi Law Journal*) [hereinafter NAACP Legal Defense Fund].

[115] Democrats lost three Senate and 18 House seats in 25 states with small or negligible (0.3%-6.6%) black populations. Bositis, *supra* note 112, at 36. Racial redistricting by definition could not have been a major concern or issue in any of these states. *See id.* at 16 (stating that black voters in western states comprise small share of electorate and their presence is generally not felt). Democratic losses, instead, should be traced to voter preferences on issues such as gun control, welfare reform, abortion, gays-in-the-military, grazing rights, environmental regulation, the Contract with America, and distrust of incumbents. *Id.* at 16-18.

[116] There is undeniable evidence, however, that major realignment is in fact taking place in the South. Recently, the New York Times reported that "10 Birmingham judges today underscored the depth of political realignment in the South by staging a dramatic mass defection to Alabama's Republican Party." Kevin Sack, *10 Alabama Judges Stage a Mass Defection to the G.O.P.*, N.Y. TIMES, Jan. 4, 1996, at A8. Since the 1994 elections, 23 Democrats in Alabama have defected to the Republican Party, including U.S. Senator Richard C. Shelby. *Id.* Since the 1992 Presidential election, 185 elected Democrats have switched to

whether the realignment and dealignment of voters in the South was driven primarily by white racial backlash, migration patterns, generational turnover, ideology, or some other cause or combination of causes.[117] But there is no disagreement that "the Solid South no longer exists,"[118] and that its dissolution began long before the last round of congressional redistricting.

Republicans made significant inroads on Democratic control of southern House seats following the presidential elections involving popular Republican candidates in 1952 (Eisenhower), 1964 (Goldwater), and 1972 (Nixon).[119] The Nixon landslide in 1972 "marked the first time since Reconstruction that all eleven southern states had at least one Republican representative."[120] Following the election of Ronald Reagan for a second term in 1984, the Republicans increased their control of southern House seats to thirty-seven percent.[121]

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the Republican party. Dick Williams, *Miller and Murphy Man the Floodgates*, ATLANTA J. & CONST., Jan. 6, 1996, at A10. Republicans now hold a majority (6 of 11) of the southern governorships. Sack, *supra* at A8.

[117] *See* Harold W. Stanley & David S. Castle, *Partisan Changes in the South: Making Sense of Scholarly Dissonance*, *in* THE SOUTH'S NEW POLITICS, *supra* note 107, at 238, 242-49 (discussing possible explanations for realignment and dealignment in southern politics). Stanley and Castle observed that "in any attempt to describe and explain change, different perspectives can yield differing results." *Id.* at 251. Stanley and Castle reached the conclusion that "increased partisan independence of southern whites reflects dealignment; the shift of black partisan identification around 1964 indicates critical realignment; Southern white partisanship provides evidence of secular realignment." *Id.* However, despite the shift in partisan composition, the South still remains a Democratic dominated region on the state level. *Id.*

[118] Charles S. Bullock, III, *Creeping Realignment in the South*, *in* THE SOUTH'S NEW POLITICS, *supra* note 107, at 220; *see also* Stanley & Castle, *supra* note 117, at 238 (stating "Republican victories, particularly at the presidential level, mark the death of the solidly Democratic South").

[119] *See* Bullock, *supra* note 118, at 228 (stating that "increases in [Republican] presence have coincided with the campaigns of Republican presidential candidates who have been particularly popular in the South").

[120] *Id.* at 230. With the election of President Nixon, the Deep South states no longer retained the status of being the least Republican region, surrendering the title to the southern border states. *Id.* at 228, 230.

[121] *Id.* at 230. The Republican gains in the 1984 congressional elections marked its greatest representation in the House at the time. *Id.*

The slow bleeding of whites from the Democratic party reached hemorrhage proportions in 1994. In the 1994 congressional elections, a majority of southern whites (65%) voted for Republican candidates for the House.[122]

The fortunes of political parties, of course, are not static. They rise and fall subject to the vagaries and vicissitudes of events. Republicans may well suffer political reversals in the months or years ahead, as they did in the aftermath of Watergate in 1974 when their share of seats in Congress declined.[123] Whites and blacks might even renew and strengthen the traditional Democratic coalition. However, whether or not any of these things happen, the implementation of effective remedies for past discrimination and minority vote dilution cannot be held hostage to partisanship or subordinated to the supposed interests of any particular party.

Frank M. Johnson, Jr., a federal district and appellate court judge from Alabama, has explained that the federal courts are, and should be, disinterested in the consequences that follow from minority political participation.[124] Johnson stated:

> When you have a voting rights case and you find that there's been a pattern in practice of discrimination against the blacks in registering to vote, you don't register the blacks to vote so that they can gain political power . . . . You are faced with some legal issues, and if they are entitled to relief you give them relief and you order that they be registered. Now the effect of their registering and voting and electing . . . officials is something that the court's not concerned with, and has no

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[122] *See* Bositis, *supra* note 63, at 54 (citing exit poll data from Mitofsky International). According to the NAACP Legal Defense Fund, the Democrats' problem in the 1994 congressional elections was "[t]oo few Democratic voters[,] . . . not the arrangement of those voters into districts." NAACP Legal Defense Fund, *supra* note 114, at 2.

[123] Bullock, *supra* note 118, at 230. After Watergate, the share of U.S. House seats held by southern Republicans dropped seven percentage points while the share of seats held by non-southern Republicans dropped by twelve percentage points. *Id.*

[124] JACK BASS & WALTER DEVRIES, THE TRANSFORMATION OF SOUTHERN POLITICS 83 (1976).

interest in it.[125]

There is no principled basis for opposing equal political rights simply because, in the short run, they might give one party an advantage over the other. However desirable maintenance of the political status quo might be, it cannot morally or legally be preserved by depriving minorities of their statutory and constitutional rights.[126]

C. Ambivalent Black Democrats

Those who opposed integrated majority-minority districts during the 1990s got allies from a wholly unexpected quarter—a handful of black elected officials. No doubt reflecting the bad-for-Democrats argument, they questioned the concept of creating more majority-minority districts. One of the most visible was John Lewis, a hero of the civil rights movement and the highly respected representative from the majority-black Fifth Congressional District in Georgia.

Lewis was quoted in *USA Today* as saying that the creation of majority-minority districts "looks too much like South Africa. It seems like we're creating enclaves, we're creating little black townships. You shouldn't just put people together because they are the same color."[127] Those words, of course, echoed the sentiments of the strongest opponents of the 1982 amendments to the Voting Rights Act.[128]

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[125] *Id.* Johnson asserted that although social change resulted from the exercise of the judicial function, "that wasn't the motive and it wasn't the purpose and it wasn't the intent." *Id.*

[126] *See* Davis v. Bandemer, 478 U.S. 109, 151 (1986) (O'Connor, J., concurring) (noting "the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination" in voting); Cooper v. Aaron, 358 U.S. 1, 16 (1958) (stating that in area of school desegregation, rights of blacks "are not to be sacrificed or yielded" because of white opposition or desire to maintain status quo).

[127] Richard Wolf, *Districts Create Black 'Enclaves'*, USA TODAY, May 11, 1992, at 11A.

[128] Senator Hatch, for example, said that the adoption of a results standard for section 2 would lead to the creation of "political ghettos for minorities." S. REP. NO. 417, *supra* note 46, at 103, *reprinted in* 1982 U.S.C.C.A.N. at 276.

Lewis was not alone. Several members of the Congressional Black Caucus, including Louis Stokes, Alan Wheat, Mike Espy, and Craig Washington, along with Dan Blue, North Carolina House majority leader, and Lois DeBerry, Speaker pro tempore of the Tennessee House, filed an amicus brief with the Supreme Court in the case of *Voinovich v. Quilter*,[129] a redistricting case from Ohio. The brief, which was written essentially by the Democratic party, argued that the Voting Rights Act was not intended to lead to "political segregation" in which minority voters controlled a few districts but lacked influence in the rest.[130] The brief also warned against creating a political system that "could resemble an American version of apartheid."[131]

Lewis' statements, as well as the controversial amicus brief, may have ultimately had no impact on public debate or the deliberations of the Court. However, the statements did show that race-conscious redistricting remains a controversial issue and made white opposition to it far more acceptable and ostensibly non-racist.

After the Court's opinion in *Shaw v. Reno*, the Congressional Black Caucus, some of whose members' districts were suddenly put at risk, denounced the decision and said it casts "a chilling pall across the face of electoral politics."[132] As for creating majority-minority districts, the Caucus was of the view that it "is a clear and warranted practice."[133] Lewis also denounced *Shaw v. Reno* as "the greatest threat to the Voting Rights Act since it was written on August 6, 1965. If it wasn't for the Voting Rights Act, it would still be primarily white men in blue suits in Congress."[134] But the retractions came too

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[129] 507 U.S. 146 (1993).

[130] Brief Amici Curiae on Behalf of Congressman Louis Stokes et al. at 21, Voinovich v. Quilter, 507 U.S. 146 (1993) (No. 91-1618).

[131] *Id.* at 22. The brief went further to state that the use of majority-minority districts was an "ingenious method[] to limit the political power of minority voters by segregating them into a limited number of districts." *Id.*

[132] Laughlin McDonald, *Voting Rights and the Court: Drawing the Lines*, SOUTHERN CHANGES, Fall 1993, at 1, 5 (quoting Congressional Black Caucus).

[133] *Id.* (quoting Congressional Black Caucus).

[134] *Id.* (quoting John Lewis).

late.

D. Influence Theory, or Disfranchising Minorities for Their Own Good

Another argument that gained some acceptance during the 1990s redistricting process was that blacks would actually be better off by being in the minority in a greater number of districts where they could supposedly influence the outcome of elections and thus the legislative decisions of elected officials, rather than being in the majority in a fewer number of districts where they could elect candidates of their choice.[135] On remand from the Supreme Court, the district court, in *Johnson v. Miller*,[136] embraced the creation of influence districts and ordered a redistricting plan that abolished two of the state's three majority-black districts, which it defended, in part, on grounds that the plan contained several districts in which minorities "could influence election results."[137] The district court described influence districts as those in which blacks comprised between twenty-five percent and thirty-five percent of the voting age population.[138] The district court conceded that when the percentage of registered black voters in a district declined to fifty percent, there was "a significant drop in the probability of a black candidate being elected."[139]

Similarly, in *Rural West Tennessee African-American Af-*

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[135] *See* Mark Sherman, *Diluting Black Votes for a Stronger Voice*, ATLANTA J. & CONST., Dec. 17, 1995, at G3 (contending that spread of black voters over more districts will result in more politicians paying attention to black concerns but will also result in election of fewer black officials). White Democrats favor the idea of creating more influence districts because blacks tend to vote overwhelmingly Democratic, and white Democrats believe influence districts will result in the election of white Democratic candidates. *Id.*

[136] No. CV 194-008, 1995 WL 783038, at *1 (S.D. Ga. Dec. 13, 1995).

[137] *Johnson*, 1995 WL 783038, at *9.

[138] *Id.* The district court's remedy included six congressional districts with minorities comprising at least 25% of the district's voting-age population. *Id.*

[139] *Id.* at *10 (citing report of Dr. Katz). The district court relied on expert testimony to support its contention that keeping percentages above 50% would protect the voting rights of minorities. *Id.* The district court found that "[t]he probability of electing a black candidate is below fifty percent when the percentage of black registered voters equals fifty percent." *Id.* (citing report of Dr. Katz).

fairs Council, Inc. v. McWherter,[140] the district court found that, despite proof of the *Gingles* factors and a totality of circumstances showing that blacks lacked the equal opportunity to elect candidates of their choice, the plaintiffs were not entitled to an additional majority-black senate district in the heavily black, rural western part of the state because the existing plan contained three majority-minority districts and three districts with blacks comprising at least thirty percent of the voting-age population.[141] According to the district court, the three districts with at least a thirty percent black voting-age population provided blacks the opportunity to *influence* elections.[142]

1. Section 2 Protects the Right to Elect

In amending section 2 in 1982, Congress guaranteed the equal right of minorities "to *elect*" candidates of their choice,[143] and not simply the right to influence elections. One need not go beyond the plain language of the statute to conclude that the influence theory is inconsistent with the Voting Rights Act. Where the terms of a statute are "unambiguous, judicial inquiry is complete."[144] Thus, when interpreting statutory language, a court "must presume that a legislature says in a statute what it means and means in a statute what it says there."[145]

It is also clear, as indicated by the legislative history, that Congress intended section 2 to protect the equal opportunity to

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[140] 877 F. Supp. 1096 (W.D. Tenn.), *aff'd sub nom.* Rural W. Tenn. African-Am. Affairs Council, Inc. v. Sundquist, ___ U.S. ___, 116 S. Ct. 42 (1995).

[141] *McWherter*, 877 F. Supp. at 1106-07.

[142] *Id.* The district court found that two strong influence districts would provide blacks with greater influence on the legislative process than the creation of another majority-minority district. *Id.* at 1107. However, the district court qualified its holding by rejecting the "impl[ication] that the legislature could adopt a plan under current circumstances with no majority-minority districts at all if it created a sufficient number of influence districts." *Id.* at 1107 n.11.

[143] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b) (1988)) (emphasis added).

[144] Rubin v. United States, 449 U.S. 424, 430 (1981).

[145] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

elect candidates of choice, and not merely the opportunity to influence the outcome of elections.[146] During the congressional hearings, opponents argued that the amendment of section 2 would actually limit the political opportunities of minorities by allowing them "to become isolated" in single-member districts[147] and would "prevent minority members from exercising influence on the political system beyond the bounds of their quota."[148] Members of the Senate Committee on the Judiciary similarly argued that adoption of a results standard for section 2 would lead to the creation of majority-minority districts, or "political ghettoes for minorities," and that while "[m]inority *representation* in the most primitive sense may be enhanced by the proposed amendment[][,] minority *influence* [would] suffer enormously."[149] Congress weighed these arguments but determined that minorities should be guaranteed the equal right to elect representatives of their choice. According to Senate Report 417, the testimony and other evidence presented to the Committee contradicted the predictions and speculations that the amendment of section 2 would limit the political opportunities of minorities.[150] The Committee found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify."[151]

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[146] S. REP. NO. 417, *supra* note 46, at 28, *reprinted in* 1982 U.S.C.C.A.N. at 206.

[147] *Id.* at 149 (statement of Prof. Edward J. Erler). The argument asserted that the amendment would "preclud[e] the possibilities of ever creating a common interest . . . that transcends racial class considerations." *Id.* (statement of Prof. Edward J. Erler).

[148] *Id.* at 150 (statement of Robert M. Brinson).

[149] *Id.* at 103 (additional views of Sen. Orrin Hatch). Senator Hatch also opined that the standard of review by courts and the historical perspective of discrimination in the United States would be affected by the creation of a results standard. *Id.* (additional views of Sen. Orrin Hatch).

[150] *Id.* at 31-32.

[151] S. REP. NO. 417, *supra* note 46, at 32, *reprinted in* 1982 U.S.C.C.A.N. at 209. In *Gingles v. Edmisten*, the district court concluded that:

> Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and

Where Congress has assessed and weighed conflicting factors in an area such as voting rights, where it is considered to have a specially informed legislative competence, a court is not permitted "to review the congressional resolution of these factors."[152] Instead, a court is obligated to defer to the judgment of Congress, a co-equal branch of government, provided that the court is "able to perceive a basis upon which the Congress might resolve the conflict as it did."[153] There clearly is a basis upon which Congress could determine that minorities were entitled to the equal opportunity to elect candidates of their choice and that majority-minority districts were an appropriate way to achieve that goal.[154]

> floor debate. Among these were the risk that . . . creating 'safe' black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building . . . .

Gingles v. Edmisten, 590 F. Supp. 345, 356 (E.D.N.C. 1984) (footnotes omitted), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 478 U.S. 30 (1986). Similarly, in *Dillard v. Baldwin County Commission*, the district court rejected arguments that majority-black districts prevent "coalition building" and do "not help those black citizens who live outside majority-black single-member districts." Dillard v. Baldwin County Comm'n, 694 F. Supp. 836, 844 (M.D. Ala.), *aff'd*, 862 F.2d 878 (11th Cir. 1988). The district court found that "[t]hese arguments and others were rejected by Congress when it amended § 2 in 1982." *Dillard*, 694 F. Supp. at 844. After the amendment of section 2 of the Voting Rights Act, commentators described that Congress's clear intent was that "the standard should be that minority voters should have a fair opportunity to *elect* candidates of their choice—that is, to determine the choice regardless of the desires of majorities of majority group voters—and that district systems protect that right better than at-large systems." J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 551 (1993).

[152] Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

[153] *Katzenbach*, 384 U.S. at 653. Acting in defiance of a perceived congressional basis forces a court "to be blind to the realities familiar to the legislators." *Id.*

[154] Even Justice Thomas has grudgingly acknowledged that the ability to elect candidates of choice is "one possible understanding of effective exercise of the franchise," paralleling the view of John Stuart Mill that "a system that allowed a portion of the population that constituted a majority in each district to control the election of all representatives and to defeat the minority's choice of candidates was unjust because it operated to produce a 'complete disfranchisement of minorities'." Holder v. Hall, ____ U.S. ____, 114 S. Ct. 2581, 2595 & n.7 (1994) (Thomas, J., concurring) (quoting JOHN S. MILL, CONSIDERATIONS ON REPRESENTA-

In light of the language of the statute and the legislative history, the Court in its written opinions has affirmed that section 2 guarantees the equal right of minorities to elect candidates of their choice.[155] In *Thornburg v. Gingles*, Justice O'Connor noted in her concurring opinion that the Court had resolved that:

> [M]inority voting strength *is* to be assessed solely in terms of the minority group's ability to elect candidates it prefers. Under this approach, the essence of a vote dilution claim is that the State has created single-member or multimember districts that unacceptably impair the minority group's ability to elect the candidates its members prefer.[156]

The Court also acknowledged, in *Johnson v. De Grandy*, that minority voting strength can be diluted "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely out-vote them."[157] Section 2 prohibits this "sort of line-drawing where its result . . . 'impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters'."[158] Creating minority-influence

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TIVE GOVERNMENT 132 (1861)).

[155] *E.g.*, Voinovich v. Quilter, 507 U.S. 146, 153 (1993) (holding that section 2 guarantees right "of a protected class to elect its candidate of choice on an equal basis with other voters"); Thornburg v. Gingles, 478 U.S. 30, 67 (1986) (holding that violation of section 2 occurs when minorities are denied equal opportunity to elect candidates of their choice).

[156] *Gingles*, 478 U.S. at 88 (O'Connor J., concurring). More recently, in an attempt to develop a set of standards for the assessment of vote dilution claims, the Court "has adopted the view that members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body." *Holder*, 114 S. Ct. at 2595 (Thomas, J., concurring).

[157] Johnson v. De Grandy, ____ U.S. ____, 114 S. Ct. 2647, 2655 (1994). The *Johnson* Court also recognized that minority voting strength could be diluted "by packing them into one or a small number of districts to minimize their influence in the districts next door." *Johnson*, 114 S. Ct. at 2655; *see also Voinovich*, 507 U.S. at 153 (explaining how manipulation of voting district lines is "the usual device for diluting minority voting power").

[158] *Johnson*, 114 S. Ct. at 2655 (quoting *Voinovich*, 507 U.S. at 153). The manipulation of district lines where the minority group is divided in such a way that it does not constitute a majority in any district allows "the majority in each district [to] vote[] as a bloc against the minority candidate," thus depriving the

districts is in reality nothing more than a euphemism for "fragmenting the minority voters."[159]

While the Court has not expressly held that claims of influence dilution can be brought under section 2, it has defined influence districts as districts in which black voters would not constitute a majority but would constitute an "influential *minority*" in which they could, with the help of a sufficient number of "cross-over votes from white voters," elect their candidates of choice.[160] Similarly, in *Gingles*, Justice O'Connor asserted in her concurrence that a minority too small to constitute a majority in a single-member district would have an interest protected by section 2—whether it is called the ability to elect or the ability to influence elections—if it "can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer."[161] Any definition of influence under section 2 that is divorced from the ability of minorities to elect candidates of their choice would thus be contrary to the definition of influence articulated by the Court.

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minority group of an equal opportunity. *Voinovich*, 507 U.S. at 153.

[159] *Johnson*, 114 S. Ct. at 2655; *see* Connor v. Finch, 431 U.S. 407, 423 (1977) (criticizing redistricting in Mississippi in fragmented areas "where much of the Negro population is concentrated"); *see also* FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 51 (1990) (identifying "the fragmentation of black population concentrations to prevent blacks from having an effective voting majority in any district" as one of classic techniques of racial gerrymandering).

[160] *Voinovich*, 507 U.S. at 154. Despite the Court's reluctance to afford "influence-dilution claims" viability under section 2, the *Voinovich* Court, in order to resolve the case, assumed that appellees' "influence-dilution claims" were "in fact . . . a cognizable § 2 claim." *Id.*

[161] Thornburg v. Gingles, 478 U.S. 30, 89 n.1 (1986) (O'Connor, J., concurring). Justice O'Connor based her assertion on the reasoning "that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories." *Id.* at 90 n.1 (O'Connor, J., concurring).

2. *Influence Theory As Dubious Social Science*

Influence theory also makes the assumption that officials elected from districts with more than *de minimis* (typically 25% to 35%) minority populations will be responsive to the needs of minorities and provide them quality representation. In *McWherter*, for example, the district court was confident that a minority that "comprises at least 25% of the voting-age population in an electoral district will have significant influence on candidates in virtually every election."[162]

The court found most probative of this assumption the self-serving testimony of a white incumbent senator who was threatened with the loss of his seat without the support of black voters.[163] The senator claimed that the creation of an additional majority-minority senate district through the removal of black voters from minority influence districts would diminish the influence of black voters because it would lead to the election of "at least one more conservative white senator" who would vote against minority interests.[164] As an example, the threatened incumbent claimed that the "new conservative senator, elected from an overwhelmingly white district, would be uninfluenced by black voters and would have been inclined to vote against the Martin Luther King holiday" bill which the senator claimed, and the court duly found, "passed the [Tennessee] Senate by only one vote."[165] However, the senator and

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[162] Rural W. Tenn. African-Am. Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096, 1105 (W.D. Tenn.), *aff'd sub nom.* Rural W. Tenn. African-Am. Affairs Council, Inc. v. Sundquist, ____ U.S. ____, 116 S. Ct. 42 (1995). The district court supported its assumption through a race neutral analysis of the 1992 and 1994 Tennessee Senate elections where "[i]n every contested race, if 25% of those who voted had changed their votes from the winning candidate to the losing candidate, they would have reversed the results of the election." *McWherter*, 877 F. Supp. at 1105.

[163] *McWherter*, 877 F. Supp. at 1106. The white senator represented a district with a "33% black voting-age population" and "without the support of black voters he most likely would have lost races." *Id.* at 1105.

[164] *Id.* at 1106. The senator argued that the removal of "black voters from the influence districts to create a new majority-minority district" would lead to the election of a new conservative white senator who "would be uninfluenced by black voters." *Id.*

[165] *Id.*

the court were both mistaken. Only eight senators voted against the largely symbolic Martin Luther King bill while eighteen senators voted in favor of the bill and six senators abstained from voting.[166] Thus, another vote against the bill would not have made a difference to passage of the bill. Moreover, twelve of the eighteen senators voting for the bill represented districts that were neither majority-black nor minority-influence districts.[167] Based on the record in *McWherter*, minority influence is more theory than fact.

Influence theory, while no doubt enormously reassuring and convenient to whites seeking to justify their control of as many legislative districts as possible, has little or no support in social science evidence. The responsiveness of elected officials is not a linear continuum along which responsiveness increases as the minority population percentage in a district increases. In his classic study of southern politics in the 1940s, V.O. Key, Jr. found that the presence of increased numbers of blacks in a jurisdiction was associated with white backlash and greater levels of turnout by whites who felt their dominance threatened.[168] Increasing the percentage of blacks in a district could therefore have a *negative* effect on minority influence and the responsiveness of elected officials with the more heavily black districts being represented by the most conservative, least responsive white legislators. As Key found, "the backbone of southern conservatism may be found in those areas with high concentrations of Negro population."[169]

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[166] TENN. S.J. 2831 (May 24, 1984).

[167] *See* Stipulation of Facts at app. 13, Rural W. Tenn. African-Am. Affairs Council, Inc. v. McWherter, 877 F. Supp. 196 (W.D. Tenn.) (No. 92-2407-TU) (listing population of state senate districts), *aff'd sub nom.* Rural W. Tenn. African-Am. Affairs Council, Inc. v. Sundquist, ___ U.S. ___, 116 S. Ct. 42 (1995) & THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 100 (1984) (listing 1984 Tennessee state senators).

[168] V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 516 (Univ. of Tenn. Press 1984) (1949). Key found that "[r]elatively about 50 per cent more whites voted in the predominantly black counties than in those of lighter hue." *Id.*

[169] *Id.* at 43. Key further observed that "[t]he [mere] presence of a large proportion of Negroes in the population alone may induce a degree of conservatism." *Id.* at 44. Key explained the strong Southern conservatism in predominantly black

William R. Keech, writing in 1968, modified Key's hypothesis in light of increased black voter participation in the South following passage of the Voting Rights Act.[170] Keech posited a curvilinear relationship between districts with few blacks producing relatively liberal representatives, and districts with greater numbers of blacks electing conservative legislators, until the black population was large enough to be an effective voting majority.[171] According to Keech:

> Up to about 30 percent of the electorate Negro the relationship would be positive because the threshold of white resistance seems to be 30 percent of the population Negro. Between 30 and 50 percent of the electorate Negro, the relationship might become neutral or negative, because white resistance will be higher in communities with larger Negro population bases. Beyond 50 percent of the electorate Negro, the relationship will again become positive, because . . . a Negro voting majority can overcome a lot of white resistance.[172]

More recent studies have confirmed the Key-Keech analysis. Michael Combs, John Hibbing, and Susan Welch found that a curvilinear pattern characterized the voting patterns of Democrats in the South with a decrease in responsiveness to the concerns of black voters in districts falling in the thirty percent to forty percent black range.[173]

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counties as an attempt by the ruling group "[t]o maintain its own status" by opposing "any political program that tends to elevate or excite the masses." *Id.*

[170] *See* WILLIAM R. KEECH, THE IMPACT OF NEGRO VOTING: THE ROLE OF THE VOTE IN THE QUEST FOR EQUALITY 1 (1968) (studying prospects of actual improvement in Negro status through voter registration drives).

[171] *See id.* at 101 (finding "curvilinear relationship between percent of the electorate Negro and payoffs of voting"). Keech hypothesized "that the greater the Negro proportion of a population, the greater the salience of race to white voters" and "[w]hen the salience of race is high . . . whites are highly cohesive in voting against Negroes or voting against candidates supported by Negroes." *Id.* at 102.

[172] *Id.* at 101.

[173] Michael W. Combs et al., *Black Constituents and Congressional Roll Call Votes*, 37 W. POL. Q. 424, 429 (1984). *Compare* Bernard Grofman et al., *The Effect of Black Population on Electing Democrats and Liberals to the House of Representatives*, 17 LEGIS. STUD. Q. 365, 373 (1992) (finding "evidence of curvilinearity in 1981 and 1989 exactly in the districts (30 to 40% black) where Keech's work would lead us to expect it").

In a 1995 study, Charles Cameron, David Epstein, and Sharyn O'Halloran examined congressional roll call votes on bills considered important to minority interests to determine the extent to which members represented minority interests, given the percent of black voters in the district.[174] The study concluded that in the South responsiveness scores "showed a flat region from about 25 to 35 percent black voters" and that "significant improvements in representation occur[red] in the 35% to 50% range."[175]

In light of empirical social science evidence, influence districts with black populations in the twenty-five to thirty-five percent range can best be characterized as negative or flat minority-influence districts in so far as the responsiveness of white elected officials is concerned.[176] Moreover, in view of legislative log rolling and the special dynamics of elected bodies, minority influence on legislative vote outcomes, far from being reduced, could be substantially enhanced by the ability of minorities to elect candidates of their choice. A passionate appeal from a minority legislative member, for example, could well sway white colleagues.

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[174] Charles Cameron et al., Do Majority-Minority Districts Maximize Black Representation in Congress? 3 (March 1995) (unpublished manuscript, on file with the *Mississippi Law Journal*).

[175] *Id.* at 29. These findings are consistent with those of an analysis of votes in the Georgia General Assembly during the 1995 term. The study examined the votes on ten key bills particularly affecting minorities and poor people, and concluded that "[t]he voting performance of white legislators with African American constituencies in excess of 40 percent was better than the average for all members of the General Assembly." Goro Mitchell & Ettrenda Dillon, *Rating the Legislators*, *in* GEORGIA LEGISLATIVE REVIEW: 1995 180, 186 (Bob Holmes & Gretchen E. Maclachlan eds., 1995).

[176] The concept of minority influence has also been criticized as being "murky" and lacking an ascertainable standard. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 117 (1992). "When there are 'electability' claims at issue, there is a natural threshold. Without such a threshold, how does one decide whether shifting minorities from one district to another increases or decreases their overall influence?" *Id.* at 118.

3. *Influence As Self-Serving and Paternalistic*

Influence theory at bottom is paternalistic. It assumes that blacks, no matter what they themselves may think, are better off being represented by white officials who are acceptable to the majority. Influence theory denies blacks a right which whites exercise as a matter of course, the right to elect candidates of their own choosing. No one would seriously contend that whites would submit to governance by only black elected officials even if it could be demonstrated that the black officials were somewhat more responsive than white officials. Whites would surely reject for themselves what many claim is nevertheless best for blacks.

Equal voting rights involve far more than merely enjoying the fruits of government. For that reason, and because responsiveness is a highly subjective factor, Senate Report 417 provides that "[u]nresponsiveness is not an essential part of plaintiff's [section 2] case," and that a defendant's proof of responsiveness "would not negate plaintiff's showing by other, more objective factors" that minority voting strength was diluted.[177] As one court has said, the fact that "current office holders are responsive to black needs and campaign for black support is simply irrelevant to . . . [a vote dilution] inquiry; a slave with a benevolent master is nonetheless a slave."[178]

Minority-influence theory is also fairly open to the charge that it is frequently a cloak for racist opposition to equal voting

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[177] S. REP. NO. 417, *supra* note 46, at 29 n.116, *reprinted in* 1982 U.S.C.C.A.N. at 207. House Report 227 set out a number of objective factors to be considered in the aggregate when determining whether there has been a section 2 violation. *See* H.R. REP. NO. 227, 97th Cong., 1st Sess. 30 (1981) (stating some factors to be considered as "history of discrimination affecting the right to vote, racially polarity voting which impedes the election opportunities of minority group members, discriminatory elements of the electoral system such as at-large elections, [and] a majority vote requirement").

[178] McMillan v. Escambia County, Fla., 638 F.2d 1239, 1249 (5th Cir. 1981). The court of appeals stated the appropriate constitutional inquiry of a vote dilution claim as whether "the system [was] purposefully designed or perpetuated to minimize the voting strength of a recognizable, distinct class which has been singled out for different treatment." *McMillan*, 638 F.2d at 1248 (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

rights. Members of the Georgia General Assembly, for example, opposed the creation of a majority-black congressional district in 1981 on the grounds that blacks would be harmed by "resegregation," "white flight," and the disruption of the "harmonious working relationship between the races."[179] The District Court for the District of Columbia, in denying preclearance of the state's redistricting plan, found these reasons pretextual and that the legislature's insistence on fragmenting the minority population in the Atlanta metropolitan area was "the product of purposeful racial discrimination."[180]

CONCLUSION

Integrated majority-minority districts help counter the effects of chronic racial bloc voting and provide minorities equal electoral opportunities.[181] They also help break down racial isolation and encourage biracial coalition building.[182] They tend to bring us together as a nation and promote a politics of commonality rather than one of difference.[183] They help ensure that legislative bodies are less prone to bias, and are more inclusive, reliable, and legitimate.[184] These are goals that all Americans should support.

Destroying majority-black districts to further partisan interests[185] or on the basis of false assumptions about stereotyping,[186] segregation,[187] and minority influence[188] will

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[179] Busbee v. Smith, 549 F. Supp. 494, 507 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). Opposition to a redistricting plan allowing for a congressional district with "a 69.01% black population" was stated "in racial terms." *Busbee*, 549 F. Supp. at 506-07.

[180] *Busbee*, 549 F. Supp. at 517. The district court found "purposeful racial discrimination" because "[b]lacks, solely because of their race, were excluded from the final decision-making process . . . and whites who, for racially discriminatory reasons, opposed the creation of a district which might allow black voters an opportunity to elect a candidate of their choice were entrusted with the decision-making responsibility." *Id.* at 518.

[181] *See supra* notes 91, 135, 143, 146, 151, 155 and accompanying text.

[182] *See supra* notes 92-93 and accompanying text.

[183] *See supra* note 91 and accompanying text.

[184] *See supra* note 92 and accompanying text.

[185] *See supra* note 113 and accompanying text.

[186] *See supra* notes 84-85 and accompanying text.

[187] *See supra* notes 87-90 and accompanying text.

inevitably bleach the Congress, southern state legislatures, county governments, school boards, and city halls. That might suit some people just fine, but no system that treats blacks as second class voters and denies them the opportunities that others have to elect candidates of their choice should pretend to be a real democracy.

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[188] *See supra* notes 168-76 and accompanying text.

PROACTIVE DEFENSE STRATEGIES IN VOTING RIGHTS LITIGATION AFTER *MILLER v. JOHNSON*

Benjamin E. Griffith[*]

INTRODUCTION

A wave of change in defense strategies in Voting Rights Act[1] litigation is underway following the United States Supreme Court's curtailment of race-based districting in *Miller v. Johnson*.[2] Where once the orthodox defense to vote dilution claims was to rebut the plaintiffs' proof of the *Gingles* preconditions[3] and the Senate Report factors,[4] more proactive defense strategies are now emerging. These strategies relate not only to substantive defenses to liability under section 2 of the Voting Rights Act but also to defenses regarding redistricting

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[1] Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974e (1988 & Supp. V 1993).

[2] ___ U.S. ___, 115 S. Ct. 2475 (1995). The Court, in *Miller*, reasoned that voting districts that were based solely or predominately on race could not stand absent a showing of narrow tailoring to meet a compelling governmental interest. *Miller*, 115 S. Ct. at 2490. The Court also stated that a state defendant could prevail if "race-neutral considerations are the basis for redistricting." *Id.* at 2488 (citing Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2827 (1993)).

[3] *See infra* notes 9-14 and accompanying text.

[4] *See infra* notes 15-16 and accompanying text.

remedies based on proportional representation or other forms of group representation.[5]

Local government defendants brought into federal court amidst claims of discriminatory electoral systems are now achieving significant victories by using cutting-edge defense strategies that go beyond election results to explore the *causes* of those results.[6] These defense strategies focus on the *current impact* on electoral participation and access rather than historical discrimination.[7] The strategies also enhance the ability of government defendants to implement *narrowly tailored* electoral system changes that will serve the public interest and reduce the potential divisiveness of section 2 litigation[8] hence resisting efforts designed to achieve proportional allocation of political power on the basis of race.

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[5] *See* Johnson v. De Grandy, ___ U.S. ____, 114 S. Ct. 2647, 2651 (1994) (noting state's proportionality defense). The Second Circuit has stated, "[a] purported remedy for . . . violations of section 2 . . . must include consideration of both racial fairness and traditional districting principles." Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 278 (2d Cir. 1994), *cert. granted and judgment vacated*, ___ U.S. ____, 115 S. Ct. 35 (1994).

[6] *See* League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 850-51 (5th Cir. 1993), *cert. denied*, ___ U.S. ____, 114 S. Ct. 878 (1994) (discussing state's cause based defense). The Fifth Circuit accepted the state's defense that partisan affiliation, as opposed to racial factors, explained the resulting voting patterns. *Clements*, 999 F.2d at 850.

[7] *See* NAACP v. City of Columbia, 850 F. Supp. 404, 423 (D.S.C. 1993) (discussing relevance of South Carolina's past discrimination to "current political participation"), *aff'd as modified*, 33 F.3d 52 (4th Cir. 1994), *cert. denied*, ___ U.S. ____, 115 S. Ct. 1095 (1995). The court stated, "a past history of discrimination in other areas is relevant in so far as its lingering affects presently influence [minority political participation]." *City of Columbia*, 850 F. Supp. at 423 (citing City of Mobile v. Bolden, 446 U.S. 55, 69 (1980)).

[8] *See* Hines v. Mayor of Ahoskie, 998 F.2d 1266, 1274-75 (4th Cir. 1993) (overruling lower court's refusal to accept town's "three out of five single-member, minority-controlled districts [plan]"). The Fourth Circuit found insufficient justification for a districting plan motivated solely by racial concerns. *Hines*, 998 F.2d at 1274. Furthermore, the court found that such a plan, as proposed by the plaintiffs, would violate the principle that "a legislature may not devise a districting plan *solely* for the purpose of segregating citizens into separate voting districts on the basis of race without sufficient justification." *Id.* (citing Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2832 (1993)).

THE PRE-*MILLER* STANDARDS

The United States Supreme Court established the pre-*Miller* framework for proving vote dilution claims in the 1986 case of *Thornburg v. Gingles*.[9] In addressing a section 2 vote dilution case under the 1982 Voting Rights Act Amendments[10] for the first time, the Court set out three "necessary preconditions" for plaintiffs to prevail:

> First, the minority group must be able to demonstrate that it is *sufficiently large and geographically compact* to constitute a majority in a single-member district . . . . Second, the minority group must be able to show that it is *politically cohesive* . . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed, . . . *usually* to defeat the minority's preferred candidate.[11]

The *Gingles* Court applied these preconditions to at-large, multi-member districts,[12] but the Court later extended the doctrine to cover cases involving single-member districts.[13] The *Gingles* Court also noted the continued relevance of the Senate Report which accompanied the 1982 Voting Rights Act Amendments.[14] In the report, the Senate Judiciary Committee elaborated on the nature of section 2 violations and the proof required to establish those violations, specifying certain "typical factors" which may be relevant to a section 2 claim.[15] Those

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[9] 478 U.S. 30 (1986).

[10] 42 U.S.C. §§ 1971, 1973b to 1973aa 6.

[11] *Gingles*, 478 U.S. at 50-51 (emphasis added) (citations omitted).

[12] *Id.* at 46-47, n.12. The *Gingles* Court noted that it had "no occasion" to make a determination on the doctrine's applicability to single-member districts. *Id.*

[13] Growe v. Emison, 507 U.S. 25, 40 (1993). The Court applied the *Gingles* preconditions in holding that deference must be given to the Minnesota legislature's redistricting plan. *Growe*, 507 U.S. at 40-41.

[14] *Gingles*, 478 U.S. at 48. The Court specifically noted that the Senate factors were subordinate to the new preconditions. *Id.*

[15] The Judiciary Committee derived the factors from the holdings in White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir.

factors are as follows:

> 1. the extent of any *history* of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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> 2. the extent to which voting in the elections of the state or political subdivision is *racially polarized*;
>
> 3. the extent to which the state or political subdivision has used *unusually large* election districts, *majority vote* requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
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> 4. if there is a *candidate slating process*, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the *effects of discrimination* in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or *subtle racial appeals*;
>
> 7. the *extent* to which members of the minority group have been *elected to public office* in the jurisdiction.
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> Additional factors that in some cases have had probative value . . . are:
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> whether there is a significant *lack of responsiveness* on the part of elected officials to the particularized needs of the members of the minority group[;]
>
> whether the *policy* underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is *tenuous*.[16]

1973), *aff'd sub nom.*, East Carrol Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976). S. REP. NO. 417, 97th Cong., 2d Sess. 27-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-07; *see also Gingles*, 478 U.S. at 36 n.4 (noting refinement of *White*'s reasoning by *Zimmer* court).

[16] S. REP. NO. 417 at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07 (emphasis added) (footnotes omitted).

IDENTIFICATION OF MOST PROBATIVE EVIDENCE

A mountain of statistical evidence awaits the trial court in most vote dilution cases.[17] The evidentiary standards call for a high degree of discernment in selecting the most useful electoral data. Decisions must be made as to whether endogenous or exogenous elections shed the most light on the issues,[18] which results are too remote[19] or aberrational[20] which elections are the product of "special circumstances,"[21] and which elections

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[17] *See* Johnson v. Miller, 864 F. Supp. 1354, 1388 (S.D. Ga. 1994) (noting importance of statistical evidence but finding that conflicting analysis can render such evidence useless), *aff'd* ___ U.S. ___, 115 S. Ct. 2475 (1995). A district court is not bound to accept statistical evidence as decisive, though it may be required to evaluate such evidence. *See* Teague v. Attala Co., 17 F.3d 796, 798 (5th Cir. 1994) (holding district court need not find statistical evidence conclusive but remanding for findings of fact and conclusions of law relating to evidence); Magnolia Bar Ass'n v. Lee, 994 F.2d 1143, 1149 (5th Cir. 1993) (holding district court not limited to statistical evidence or expert testimony in drawing conclusions), *cert. denied sub nom.*, Magnolia Bar Ass'n v. Hawkins, ___ U.S. ___, 114 S. Ct. 555 (1993).

[18] *See* Cane v. Worcester Co., 840 F. Supp. 1081, 1088 n.6 (D. Md. 1994) (stating that "[e]ndogenous elections include voting patterns in elections for offices the plaintiffs challenge in their § 2 suit"). A plaintiff may use data other than statistics from endogenous elections to establish polarized voting, "where a minority group has begun to sponsor candidates just recently." *Gingles*, 478 U.S. at 57 n.25; *see also* Rangel v. Morales, 8 F.3d 242, 248-49 (5th Cir. 1993) (finding error in lower court's disregard of exogenous election data where endogenous election evidence was unreliable); Hall v. Holder, 955 F.2d 1563, 1570-71 (11th Cir. 1992) (holding district court erred in not considering exogenous election data), *rev'd on other grounds*, ___ U.S. ___, 114 S. Ct. 2581 (1994); Westwego Citizens for a Better Gov't v. City of Westwego, 872 F.2d 1201, 1209 (5th Cir. 1989) (applying note 25 of *Gingles*); Williams v. City of Dallas, 734 F. Supp. 1317, 1391 n.285 (N.D. Tex. 1990) (noting admissibility of exogenous election evidence); *cf. Magnolia Bar Ass'n*, 994 F.2d at 1149 (stating that "elections involving the particular office at issue will be more relevant than elections involving other offices").

[19] *See, e.g.*, NAACP v. City of Columbia, 850 F. Supp. 404, 420 (D.S.C. 1993) (finding casual link between past discrimination and low minority voter turnout too remote), *aff'd as modified*, 33 F.3d 52 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1095 (1995).

[20] *See Magnolia Bar Ass'n*, 994 F.2d at 1149 (discussing aberration in elections). The court, in *Magnolia Bar Ass'n*, thought it "entirely reasonable to permit [a] district court to examine the election results offered by both sides, as well as the circumstances surrounding those elections . . . [to determine] which elections are aberrational." *Id.*

[21] *See Gingles*, 478 U.S. at 57 (stating polarized voting are not overcome by

reveal significant patterns of crossover voting,[22] minority electoral success,[23] or non-racial causes of minority electoral failure.[24] On the other side of the statistical evidence equation lies a fertile area of factual development—anecdotal evidence or lay testimony indicative of minority access and participation, bi-racial coalitions, and the lack of racial animus in the challenged electoral system.[25]

SECTION 2 LEGISLATIVE HISTORY AND LITIGATION HISTORY

The first decade of vote dilution litigation under the expanded section 2 interpretation pushed many courts into an

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minority victory in any one election due to possible existence of "special circumstances"). The Court listed "the absence of an opponent, incumbency, or the use of bullet voting" as possible sources of "special circumstances." *Id.* The Fifth Circuit, however, stated "that [a] district court had valid reasons for not considering incumbency [as a special circumstance] of . . . black candidates . . . [when] the elections were high profile [and the time in office short]." *Magnolia Bar Ass'n*, 994 F.2d at 1149.

[22] *See, e.g.*, Teague v. Attala County, 807 F. Supp. 392, 403-04 (N.D. Miss. 1992) (refusing to accept presumption "that blacks vote only for blacks in black vs. white elections"), *aff'd in part and vacated in part*, 17 F.3d 796 (5th Cir. 1994). The court held that such a presumption undercut the goals of the Voting Rights Act. *Teague*, 807 F. Supp. at 403-04.

[23] *See, e.g., id.* at 404 (noting successful election of black candidates). The court accepted the election of black candidates as evidence that the election process was "equally open" to all participants. *Id.*

[24] *See* League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 859 (5th Cir. 1993) (noting probative value of evidence that voting patterns result from partisan affiliation rather than racial polarization), *cert. denied*, ___ U.S. ____, 114 S. Ct. 878 (1994). However, evidence which fails to examine possible non-racial electoral motivations may still have probative value. *See, e.g.*, Houston v. Lafayette Co., 56 F.3d 606, 612 (5th Cir. 1995) (finding error in failure of lower court to consider voter's motivation in elections).

[25] *See* Johnson v. De Grandy, ___ U.S. ____, 114 S. Ct. 2647, 2661 (1994) (noting ability of minorities to form electorally viable coalitions in certain communities). The *De Grandy* Court stated that a coalition "candidate may not represent perfection to every minority voter, but minority voters are not immune from the obligation[s] [of the political landscape]." *De Grandy*, 114 S. Ct. at 2661. Moreover, the political and electoral necessity of courting the minority vote in certain communities, especially single-member districts, may enhance the goal of increased minority influence. *See* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 243 (1987) (discussing minority influence in elections between white candidates).

unfortunate bean-counting mode of decision-making that often benefited the plaintiffs.[26] Contrary to the Voting Rights Act's express disclaimer against proportional representation,[27] lower courts imposed liability upon a tenuous showing of the *Gingles* preconditions as long as "some" evidence of the Senate Report factors existed.[28] The courts routinely ignored defenses by the states or municipalities contending that:

1. minority-preferred candidates were being elected to office in significant numbers;[29]
2. cross-over voting existed;[30]
3. the election results were based on factors unrelated to race;[31] and
4. minority populations were improperly strung together to

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[26] *See* THERNSTROM, *supra* note 25, at 228 (noting 90% success rate by plaintiffs in first four years under amended § 2). The author also stated that "[i]ndeed, the plaintiffs' victories in court only hint at the magnitude of [their] success . . . [because an] unquestionably large number of suits are settled out of court." *Id.* at 229.

[27] *See* 42 U.S.C. § 1973(b) (stating "[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

[28] *See* Collins v. City of Norfolk, 883 F.2d 1232, 1243-44 (4th Cir. 1989) (finding § 2 violation where black voters satisfied three *Gingles* preconditions and showed their inability to elect second black councilman), *cert. denied*, 498 U.S. 938 (1990); Citizens For a Better Gretna v. City of Gretna, 834 F.2d 496, 500-04 (5th Cir. 1987) (determining that racial bloc voting existed even where white candidates received more votes from black voters than black candidates), *reh'g denied*, 849 F.2d 1471 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); *see also* Smith v. Clinton, 687 F. Supp. 1310, 1317-18 (E.D. Ark. 1988) (finding § 2 violation because racially polarized voting existed which frustrated minority political power), *aff'd*, 488 U.S. 988 (1988).

[29] *See* Clarke v. City of Cincinnati, 40 F.3d 807, 813 (6th Cir. 1994) (noting that courts should consider extent to which minority candidates lose as well as the extent of their success in determining vote dilution), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1960 (1995); *Collins*, 883 F.2d at 1240-44 (considering extent black candidates were unsuccessful, in proving § 2 violation).

[30] *See, e.g., City of Gretna*, 834 F.2d at 502 (noting fact that black supported white candidates did not negate instances where white votes defeated black preferred candidate). The *Gretna* court realized that in an election for multiple positions "minority [voters] necessarily will have more than one preferred candidate, [and that candidate will often not be a minority]." *Id.*

[31] *See, e.g., Collins*, 883 F.2d at 1241 (denying state's claim that vote dilution was not caused by "special circumstances").

satisfy *Gingles* "geographical compactness" precondition.[32]

In short, section 2 claims were driven by a race-based single-minded goal of proportional representation—a goal contrary to the assurances provided by key Senators during the tense debate over amended section 2.[33] Thus, racial gerrymandering emerged as a by-product of the redistricting process.

TENSION BETWEEN *SHAW* AND VOTING RIGHTS ACT

In *Shaw v. Reno*,[34] the Supreme Court held that a district "so extremely irregular on its face" violated the Equal Protection Clause of the Fourteenth Amendment.[35] The Court held that unless it was shown otherwise, such a district could serve no purpose other than to segregate voters because of their race.[36] Following *Shaw*, many jurisdictions faced the dilemma that resulted from demands imposed by the Voting Rights Act for the creation of additional majority-minority districts.[37] Leg-

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[32] *See, e.g.*, Magnolia Bar Ass'n v. Lee, 793 F. Supp. 1386, 1398 (S.D. Miss. 1992) (construing first *Gingles* precondition to merely require minority voters to constitute majority within district), *aff'd*, 994 F.2d 1143 (5th Cir. 1993), *and cert. denied sub nom.*, Magnolia Bar Ass'n v. Hawkins, ___ U.S. ____, 114 S. Ct. 555 (1993).

[33] *See* S. REP. NO. 417, 97th Cong. 2d Sess. 193-95 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 363-66 (encompassing views of Senator Dole). Senator Dole was instrumental in working out the language of the non-proportionality clause in the Voting Rights Act Amendment. *See* Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What is the intent of the Results Test?*, 36 EMORY L.J. 1, 10-13 (1987) (discussing Senator Dole's role in Voting Rights Act).

[34] 509 U.S. 630, 113 S. Ct. 2816 (1993).

[35] *Shaw*, 113 S. Ct. at 2824, 2832. In *Shaw*, North Carolina voters challenged a state redistricting plan containing two majority-minority districts on the basis that these two districts were so unusually drawn to constitute political gerrymandering. *Id.* at 2820-21. The Court allowed the plaintiffs to challenge the reapportionment plan under the Fourteenth Amendment because the districts' irregularity could be deemed a racial classification requiring strict scrutiny analysis. *Id.* at 2832.

[36] *Id.* The Court classified such a reapportionment plan as "political apartheid." *Id.* at 2827. Because the Court deemed such irregularly drawn districts as irrational, the Court noted that the lower courts must determine whether the plan was narrowly tailored so as to serve a compelling governmental interest. *Id.* at 2832.

[37] *See* James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v.

islative redistricting plans could be contested by the United States Department of Justice under section 5 of the Voting Rights Act,[38] by private plaintiffs under section 2, or both. On the other hand, if the governmental entity provided for additional majority-minority district, it faced the possibility of a *Shaw*-type suit under the Fourteenth Amendment because the additional district would not necessarily be geographically compact.[39] State and local governments require guidance from the Supreme Court in view of this demonstrated tension between the Voting Rights Act and the Court's decision in *Shaw*.

De Grandy: Rejection of the Maximization Principle

In *Johnson v. De Grandy*,[40] the Supreme Court ruled that the Voting Rights Act did not require a state to maximize the number of majority-minority districts or to draw additional majority-minority districts simply because it was physically possible to do so.[41] In *De Grandy*, minority voters challenged a Florida redistricting plan on the basis that the plan had unlawfully fragmented the voting strength of minority voters and

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Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 558-63 (1995) (noting that Justice Department required maximization of majority-minority districts before granting pre-clearance).

[38] 42 U.S.C. § 1973c. Section 5 prohibits states from redistricting without federal pre-clearance from the United States Department of Justice. *Id.*

[39] *See* T. Alexander Aleinikuff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 619-21 (1993) (discussing problems with defining compactness following *Shaw*). For example, the Louisiana Legislature created an additional majority-minority congressional district rather than running the risk of antagonizing the Justice Department or private plaintiffs and thus inviting a voting rights enforcement action and jeopardizing 1992 congressional elections. *See* Hays v. State, 839 F. Supp. 1188, 1190-91 (W.D. La. 1993) (challenging Congressional redistricting after 1990 census), *vacated*, ___ U.S. ___, 114 S. Ct. 2731 (1994). As a result, it encountered a challenge under *Shaw* alleging that the subject Congressional district was not geographically compact and violated the Equal Protection Clause of the Fourteenth Amendment. *Hays*, 839 F. Supp. at 1190-91.

[40] ___ U.S. ___, 114 S. Ct. 2647 (1994).

[41] *De Grandy*, 114 S. Ct. at 2659-62. Justice O'Connor, in a concurring opinion, stated "that § 2 does not require maximization of minority voting strength, . . . [but] minority voters [must] be given equal opportunity to participate in the political process." *Id.* at 2664 (O'Connor, J. concurring).

that an additional majority-minority district could be formed.[42] The Court determined that no violation under section 2 had been shown.[43] The Court reasoned that plaintiffs had the burden of showing an apportionment plan's invalidity and that the state's mere failure to maximize majority-minority districts would not suffice to show a violation under section 2.[44]

DEVELOPMENT OF DEFENSE STRATEGIES

Following the 1990 national population census, many state legislatures began to use census data to determine whether population shifts during the past decade required the state to adopt a new apportionment plan.[45] Many states that opted for redistricting adopted apportionment plans which maximized the number of majority-minority districts.[46] States that failed to adopt a maximizing plan were challenged by plaintiffs alleging a voting rights violation.[47] Still, some plaintiffs challenged these plans under the Fourteenth Amendment's Equal Protection Clause.[48]

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[42] *Id.* at 2651-52. The plaintiffs, consisting of Hispanic and black voters, challenged the state's apportionment plan because the plan had become "malapportioned." *Id.* The state legislature then adopted a new plan, but the plaintiffs argued that the plan should have created an additional majority-minority district. *Id.*

[43] *Id.* at 2663. The Court determined that the new plan was valid when viewing the totality of the circumstances, including proportionality. *Id.*

[44] *Id.* at 2659-62. The Court noted that every state apportionment plan was distinct and required a separate analysis of its validity under the totality of the circumstances. *Id.* Thus, the Court ruled that no single statistic could determine whether vote dilution existed. *Id.*

[45] *See* Pamela S. Karlan, *All Over the Map: The Supreme Court: Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 255-56 (noting use of census data in redistricting). Many plaintiffs brought Voting Rights Act suits with the intention of gaining leverage in new districting plans mandated by the 1990 census, rather than challenging the old districts. *Id.* at 255.

[46] *See supra* note 37 and accompanying text.

[47] *See, e.g., De Grandy*, 114 S. Ct. at 2652 (noting that plaintiffs' main contention in voting rights claim was that state legislature failed to maximize number of majority-minority districts). The *De Grandy* plaintiffs demonstrated specific areas in the state where minority populations could have formed a voting majority in a compact district. *Id.*

[48] *See* Johnson v. Miller, 864 F. Supp. 1354, 1359 (S.D. Ga. 1994) (applying

Many felt that the Supreme Court's decision in *Shaw v. Reno* was the beginning of a long-term scale-back in the more extreme applications of the Voting Rights Act, in the context of both liability and remedy. The Court's focus in *Shaw* on compactness conflicted both with the Justice Department's permissible approach to compactness of majority-minority districts in section 5 preclearance review and other plaintiffs in section 2 actions.[49]

On June 29, 1995, the Supreme Court handed down its five-four decision in *Miller v. Johnson*,[50] invalidating Georgia's Eleventh Congressional District on equal protection grounds.[51] The Court held that when a legislature used race as the predominant factor in placing voters in a certain district, and where racial considerations dominated historical race-neutral districting policies, a strict scrutiny analysis should be applied.[52] Such a district, unexplainable on grounds other than race, could only be sustained if narrowly tailored to serve a compelling governmental interest.[53]

As to governmental bodies who would not voluntarily engage in this political resegregation process, many were named

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Equal Protection Clause in case involving racial gerrymandering), *aff'd*, ___ U.S. ___, 115 S. Ct. 2475 (1995); *see also* Shaw v. Barr, 808 F. Supp. 461, 468-73 (E.D.N.C. 1992) (considering equal protection claim), *rev'd sub nom.* Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816 (1993); Vera v. Richards, 861 F. Supp. 1304, 1308-09 (S.D. Tex. 1994) (challenging redistricting under Fourteenth Amendment), *prob. juris. noted sub nom.*, Bush v. Vera, ___ U.S. ___, 115 S. Ct. 2639 (1995). If districting is based predominately on race it is subject to strict scrutiny under the Equal Protection Clause therefore a "[s]tate must demonstrate . . . districting legislation is narrowly tailored to achieve a compelling governmental interest." *Miller*, 115 S. Ct. at 2490 (citing *Shaw*, 113 S. Ct. at 2829-32).

[49] *See supra* notes 37-39, 41 and accompanying text.

[50] ___ U.S. ___, 115 S. Ct. 2475 (1995).

[51] *Miller*, 115 S. Ct. at 2490. The Court reasoned that it was impermissible to use the Voting Rights Act "to demand the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 2494.

[52] *Id.* at 2488-90. The Court recognized that districting is a legislative function presumed to be done in good faith and that race should be a consideration weighed no more heavily than any other. *Id.* at 2488.

[53] *Id.* at 2490. The *Miller* Court determined that complying with "Justice Department's preclearance demands" could not serve as a compelling governmental interest to maximize majority-black districts. *Id.* at 2490-94.

as defendants in voting rights actions but, quite surprisingly, were able to assert factual and legal defenses that, in a number of instances, were upheld.[54]

SUCCESSFUL DEFENSE STRATEGIES

While racial gerrymandering cases slowly worked their way to the United States Supreme Court, many section 2 cases were rocketing through that same legal system, raising similar issues that focused upon the role of race in the electoral process.[55] Successful defenses were asserted in a number of these and other cases, both as to liability and as to remedy. The balance of this article will focus on those cases and their relationship to the pending racial gerrymandering cases, including *Miller v. Johnson*.[56]

1. Clarke v. City of Cincinnati

In *Clarke v. City of Cincinnati*,[57] the Sixth Circuit Court of Appeals upheld Cincinnati's City Council electoral system and rejected challenges under section 2 of the Voting Rights Act and the Equal Protection Clause.[58] The city established that forty-seven percent of black candidates preferred by blacks had been elected in city council elections from 1981 to 1991, leading to the conclusion that plaintiffs had failed to show legally significant, white racial bloc voting, since "[t]his success

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[54] *See supra* notes 44-48 and accompanying text.

[55] *See, e.g.*, Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 278 (2d Cir. 1994) (affirming in part plaintiff's preliminary injunction prohibiting city council elections under reapportionment plan), *cert. granted and judgment vacated*, ___ U.S. ____, 115 S. Ct. 35 (1994); Hines v. Mayor of Ahoskie, 998 F.2d 1266, 1274-75 (4th Cir. 1993) (reversing district court judgment reducing town council from five members to four); Jeffers v. Tucker, 847 F. Supp. 655, 662 (E.D. Ark. 1994) (denying § 2 claim on grounds that plaintiffs had not satisfied vote dilution "compactness precondition").

[56] *See supra* notes 50-53 and accompanying text.

[57] 40 F.3d 807 (6th Cir. 1994), *cert. denied*, ___ U.S. ____, 115 S. Ct. 1960 (1995).

[58] *Clarke*, 40 F.3d at 809, 816. The court rejected plaintiffs' claims of "white bloc voting" and "discriminatory intent" in the Cincinnati voting system. *Id.* at 812-16.

rate gives us no reason to find that blacks' preferred black candidates have 'usually' been defeated."[59]

The court was also critical of the flawed reasoning of the Fourth Circuit's leading voting rights decision in *Collins v. City of Norfolk*,[60] wherein "[fifty-four] percent of blacks' preferred black candidates had been elected in the ten city council elections studied . . . [, although] black voters had never been able to elect more than one of their preferred candidates (of any race) during any single election."[61] The *Collins* court found a section 2 violation based on a finding of white bloc voting.[62] The *Clarke* court distanced itself from *Collins* "because it has no stopping point short of guaranteed proportional representation for racial minorities."[63] The court also criticized the *Collins* approach as ignoring the successes of minority-preferred candidates thereby allowing a finding of a section 2 violation in most cases.[64]

2. Teague v. Attala County

The case of *Teague v. Attala County*[65] presented a classic battle of the experts in which anecdotal evidence proved to be the decisive factor.[66] In rejecting section 2 challenges to both a

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[59] *Id.* at 812-13. The *Clarke* court stated that "the existence of racially identifiable voting patterns itself is not sufficient to demonstrate . . . white bloc voting." *Id.* at 812 (citing Thornburg v. Gingles, 478 U.S. 30, 49 (1986)).

[60] 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990).

[61] *Clarke*, 40 F.3d at 813 (citing *Collins*, 883 F.2d at 1240).

[62] *Collins*, 883 F.2d at 1240. The *Collins* court thought it "apparent . . . that the white majority voted sufficiently as a bloc to defeat . . . minority preferred candidates [seeking a second city council position]." *Id.*

[63] *Clarke*, 40 F.3d at 813. The *Clarke* court thought this effectively deleted the proportional representation disclaimer from § 2. *Id.*; *see supra* note 33 and accompanying text.

[64] *Clarke*, 40 F.3d at 813. The *Collins* approach would force a defendant to prove proportional representation or to lose in a Voting Rights Act case. *Id.* (citing Thornburg v. Gingles, 478 U.S. 30, 77 (1986)).

[65] No. 1:91-CV-209-D-D (N.D. Miss. Mar. 20, 1995).

[66] *Teague*, slip op. at 12-15, 19. The plaintiffs', United States', and Defendant's experts disagreed over the use of ecological regression and extreme case analysis. *Id.* at 12-15. The Defendant's expert argued that the ecological regression analysis was not reliable and disagreed with the use of extreme case analysis due to an insufficiently low proportion of black voting age population percentage. *Id.* at 13-

board of supervisors' plan and a justice court's redistricting plan, the court found that the plaintiffs had failed to prove racial polarization noting that "[f]actors such as a candidate's experience, qualifications, education and contact with the electorate are of much greater significance than race to voters in Attala County."[67] The court also noted a lack of statistical evidence comparing election results to factors other than race.[68] The *Teague* court ultimately relied on testimony of lay witnesses and political veterans in determining that elections were based on non-racial factors.[69] Lastly, the court stated "the experiences and observations of individuals involved in the political process in Attala County strongly indicate a lack of black political cohesion and a significant white and black crossover voting."[70]

3. Johnson v. Hamrick

In *Johnson v. Hamrick*,[71] the City of Gainesville, Georgia, prevailed in a section 2 challenge brought against its at-large city council electoral system.[72] The court reasoned that while "[l]ack of electoral success [may be] evidence of vote dilution . . . courts must also examine other evidence in the totality of circumstances, including the extent of opportunities minority voters enjoy to participate in the political process."[73] The court

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[67] *Id.* at 17, 19. The court declared that statistical evidence of racial polarization without further evidence is insufficient to establish a § 2 claim. *Id.*

[68] *Id.* at 17. The court pointed out that the Plaintiffs failed to show black political cohesion and failed to show evidence that race is the deciding factor in voter choice. *Id.* at 19.

[69] *Id.* at 17-19. Elected officials, including black office-holders, testified that voters cast their ballot on the basis of the candidate and qualifications, not on the basis of race. *Id.* at 18.

[70] *Id.* The court found that "black and white crossover voting significantly impact election outcomes in Attala County," as shown in the 1991 sheriff primary and 1987 race for constable. *Id.* at 19.

[71] No. 2:91-CV-0002-WCO (N.D. Ga. Sept. 29, 1994), *appeal pending*, No. 94-9203 (11th Cir.).

[72] *Hamrick*, slip op. at 1-2. The *Hamrick* court determined that the plaintiffs had not met the *Gingles* requirements. *Id.*

[73] *Id.* at 19 (citing Johnson v. De Grandy ___ U.S. ____, 114 S. Ct. 2647,

concluded that the plaintiffs had failed to establish the third *Gingles* precondition of legally significant white racial bloc voting.[74]

The City also presented substantial evidence of responsiveness and minority inclusion indicative of access to the political process, leading the court to conclude "that the totality of the circumstances surrounding the electoral processes in Gainesville, Georgia, do not violate the Voting Rights Act of 1965, as amended."[75]

4. Rangel v. Morales

The Fifth Circuit rejected a section 2 claim by Hispanic voters, in *Rangel v. Morales*,[76] challenging the manner in which judges were elected to Texas' Thirteenth Court of Appeals, concluding that the district court clearly erred in finding on the basis of only one election that whites voted sufficiently as a bloc so as to usually defeat the minority preferred candidate.[77] Noting that the legal test for white bloc voting was the "usual predictability of the majority's success," the Fifth Circuit

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2657 (1994)).

[74] *Id.* at 25-26. The court noted that:

> [I]n [two] of the [four] elections in which the white preferred candidate defeated the black preferred candidate, the white preferred candidate received 50.4% of the white vote . . . and 52.8% of the white vote . . . . In these same races, 49.6% and 47.2%, respectively, of white voters voted with the losing candidate. There is no evidence in the record to suggest that 50.4% constitutes a "bloc," and this Court has reservations about deeming 52.8% a "bloc" as that term is used in voting rights cases.

Id.

[75] *Id.* at 28. The court considered testimony of improved minority conditions and that campaign support extended across racial lines. *Id.* at 27; *see also* NAACP v. City of Niagra Falls, 65 F.3d 1002, 1023 (2d Cir. 1995) (finding evidence of responsiveness in form of the city's creation of Human Rights Commission and Affirmative Action Task Force, city obtained grants to fund more "community policing" in minority neighborhoods, a successful school integration program and fair housing law offering minority business loans, as relevant to a § 2 inquiry).

[76] 8 F.3d 242 (5th Cir. 1993).

[77] *Rangel*, 8 F.3d at 248. The district court erred by not considering relevant exogenous election results exemplifying Hispanic voting power. *Id.* at 248-49.

concluded that the plaintiffs had failed to establish this third *Gingles* factor, stating, "where, as here, there is evidence of only one election on all fours with the challenged process, that evidence must be viewed together with available evidence of other elections 'that encompass more geographic area than just [the election district at issue]'."[78]

5. Magnolia Bar Association v. Lee

In *Magnolia Bar Association v. Lee*,[79] the Fifth Circuit Court of Appeals rejected a challenge to Mississippi's method of electing state supreme court justices under section 2 of the Voting Rights Act of 1965, concluding that plaintiffs had failed to meet the threshold requirements as mandated in *Gingles* for both the Northern and Southern Districts of Mississippi.[80] The court also determined that as to the Central District of Mississippi the plaintiffs' inability to fulfill the third *Gingles* precondition, which required a showing of the existence of "legally significant white bloc voting" was not met.[81] The court also noted that a district court is not bound by expert testimony on the subject of bloc voting and is free to examine election results and draw its own conclusions as to whether white bloc voting is or is not legally significant.[82] Unable to discern a basis for plaintiffs' contention that a district court must base determinations of legal significance or aberration in white bloc voting on

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[78] *Id.* at 246 (quoting Westwego Citizens for Better Gov't v. City of Westwego, 946 F.2d 1109, 1112 n.2 (5th Cir. 1991)). The district court should have considered "statewide" election results in this case. *Id.* at 247.

[79] 994 F.2d 1143 (5th Cir. 1993), *cert. denied sub nom.*, Magnolia Bar Ass'n v. Hawkins, ___ U.S. ____, 114 S. Ct. 555 (1993).

[80] *Magnolia Bar Ass'n*, 994 F.2d at 1148. The court noted that in the district court plaintiffs had failed to satisfy the first *Gingles* threshold requirement, the ability to draw a single-member district in which blacks would constitute a majority, in either the Northern or Southern Districts of Mississippi. *Id.*

[81] *Id.* The court reasoned that since the only two black candidates to run from the Central District of Mississippi had both been elected there was no "white bloc voting." *Id.*

[82] *Id.* at 1149. Plaintiffs' expert had not only judged white bloc voting in the Central District to be legally significant but had also stated that the election of two black judges to the Mississippi Supreme Court from the Central District was "aberrational." *Id.* at 1148.

expert testimony, the Fifth Circuit stated that:

> Indeed, it seems entirely reasonable to permit the district court to examine the election results offered by both sides, as well as the circumstances surrounding those elections, and determine for itself—with or without expert conclusions as to which elections are aberrational—whether the white majority votes sufficiently as a bloc so as to *usually* defeat the minority-preferred candidate.[83]

6. NAACP v. City of Columbia

The United States District Court of South Carolina, in *NAACP v. City of Columbia*,[84] also rejected a section 2 challenge mounted against a municipality's method of electing city council members.[85] Upon close examination, it is clear that the court's causation analysis was of primary importance to the defense victory in this case, with the court finding that plaintiffs had failed to prove the *Gingles* preconditions of minority political cohesion and white bloc voting and, thus, had failed to prove vote dilution in violation of section 2.[86] Faced with the defeat of three black candidates in the election under analysis, the court refused to find as the causation of these defeats the behavior of white voters stating that "black voters themselves have failed to take reasonable steps to assure their victory."[87]

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[83] *Id.* at 1149. Unable to find merit in plaintiffs' position, the court opined that it was reasonable for the district court to "conclude that the election of two black judges from the Central District was not aberrational, but rather, probative evidence that whites would not vote as a bloc so as to usually defeat the preferred supreme court candidate of black voters." *Id.*

[84] 850 F. Supp. 404 (D.S.C. 1993), *aff'd as modified*, 33 F.3d 52 (4th Cir. 1994), *cert denied*, ___ U.S. ____, 115 S. Ct. 1095 (1995).

[85] *City of Columbia*, 850 F. Supp. at 430. The method of election at issue was the "4-2-1" method, whereby four city council members would be elected out of single-member districts, with two council members and the mayor being elected from the city at large. *Id.* at 406.

[86] *Id.* at 418-21. The plaintiff was successful only in proving the first *Gingles* factor of a "geographically compact majority in a single-member district." *Id.* at 413; *see supra* note 11 and accompanying text.

[87] *City of Columbia*, 850 F. Supp. at 415-16; *see also* Smith v. Brunswick Co., 984 F.2d 1393, 1401 (4th Cir. 1993) (holding that failure of black voters to elect blacks was "will of the voters and not the result of an illegal discriminatory vot-

The court further stated that the purpose of the *Gingles* precondition of minority political cohesion was "to show that black voters have 'distinctive political interests' to be furthered in the [challenged] electoral body" and that in the absence of such interests "there is nothing to be thwarted" and that the paramount evidence of those interests "would appear to be the behavior of the group in voting for the offices in question."[88] In addition, the court noted that for purposes of establishing the *Gingles* precondition of cohesiveness of the minority group, "a group claiming that the election system is depriving it of the benefits of its numbers should be able to demonstrate that the failure to elect a candidate of the group's choice was not due to a lack of cohesiveness of the group itself."[89]

The court also took issue with plaintiffs' suggestion that low black voter turnout in city elections was attributable to low turnout by all voters in city elections,[90] residual effects of past discrimination,[91] and the choice of blacks to abstain from vot-

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ing process"). The Fifth Circuit has stated that "[n]either our written law nor the construct of our constitutional republic assures any race or otherwise identifiable voting group, strict proportional representation." Washington v. Tensas Parish Sch. Bd., 819 F.2d 609, 612 (5th Cir. 1987) (citing Marshall v. Edwards, 582 F.2d 927, 938 (5th Cir. 1978), *cert. denied sub nom.*, East Carroll Parish Police Jury v. Marshall, 442 U.S. 909 (1979)).

[88] *City of Columbia*, 850 F. Supp. at 418. The court stated further that:

> The ultimate question should be whether the evidence demonstrates that blacks as a whole—not merely the plaintiffs or some segment of the black population—have distinctive political interests for the City of Columbia that they have attempted to further by voting together for candidates to the City Council. In most cases, that determination can be made from examining the behavior of the segment of the black population who chose to participate in the elections at issue.

Id.

[89] *Id.* at 419. For an excellent discussion of the requirement of political cohesiveness as applicable to aggregated minority groups, *see generally* Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. ILL. L. REV. 441, 458-67.

[90] *City of Columbia*, 850 F. Supp. at 419. Though conceding that voter turnout among both whites and blacks was lower in city elections than in state elections, the court noted that statistics used in analysis which indicated that the candidates of choice of black voters would have been elected in the presence of black voting cohesion were "based on black turnout in *actual* city elections." *Id.* at 420.

[91] *Id.* at 419-20. The court rejected this contention, noting that black voter

ing all together in light of the meager possibility of electing their choice at large.[92] The court found that plaintiffs' evidence of racially polarized elections, electoral losses by three black candidates for citywide office, and the perceived inability of blacks to be elected at large was "simply not sufficient to overcome the evidence that the blacks who lost owe their losses as much to blacks' failure to vote more cohesively or to turn out at all as to failure to achieve white support."[93] Addressing the totality of the circumstances, the court found that notwithstanding South Carolina's past history of discrimination concerning the franchise, "there are no vestiges of past discrimination that significantly interact with present political structures to deny access to the political system."[94]

Finally, the court rejected plaintiffs' claim that in city elections low black voter turnout was "attributable, to a significant degree, to the inability of blacks to learn of the election, to obtain transportation to the polls, or to mobilize in support of candidates and issues."[95] The court instead found that "[a] far

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turnout had peaked in prior election years and that it was logical to assume that any residual effects of discrimination on black voter turnout would manifest itself in "lower participation by blacks in elections closer to that discrimination, rather than in more recent elections." *Id.* at 420.

[92] *Id.* The court rejected this disincentive argument, noting record levels of black voter turnout in the 1990 mayoral election, as well as the plaintiffs' own evidence which showed significant black voter turnout in special elections, resulting in the seating of black candidates. *Id.*

[93] *Id.* The court noted that this view was further bolstered by evidence presented which indicated that in present day Columbia, a black candidate could even be elected to the city council in an at large election. *Id.* The court opined further that "[g]iven the present black percentage of the electorate, this [25%] level of white support would elect a [black] candidate today, so long as the candidate receives solid black support." *Id.*

[94] *Id.* at 421. In reference to the state's pre-1975 history of racial discrimination, the court noted that "[m]ost of the City's population is too young to have been effected by the white primary law or literacy tests, [and that] [s]ignificantly, plaintiffs have not identified any black citizens who today feel unable to participate in the political process because of the past existence of these requirements." *Id.* at 422; *see supra* note 91 and accompanying text.

[95] *City of Columbia*, 850 F. Supp. at 423; *see also* Alonzo v. City of Corpus Christi, 68 F.3d 944 (5th Cir. 1995) (rejecting a § 2 challenge to city's electoral system). The *Alonzo* court reasoned that the relatively small number of minority electoral wins resulted not from discrimination but from low minority voter turn-

more plausible explanation for low black turnout in city elections is the same as that for low turnout generally: voters are either satisfied that the [c]ity is working well, thus little interest is generated by campaigns, or they are generally uninspired by some of the candidates."[96]

7. Cane v. Worcester County

In *Cane v. Worcester County*,[97] the Fourth Circuit Court of Appeals held the order of the United States District Court for the District of Maryland mandating the implementation of a cumulative voting system for county elections to be an abuse of discretion.[98] The unanimous court based its decision on the district court's failure to give adequate deference to the expressed governmental interests and policy preferences underlying the county's existing electoral system.[99]

In holding that the district court abused its discretion in adopting the cumulative voting scheme proposed by plaintiffs, the Fourth Circuit reasoned that the district court had failed to give due deference to the county's legislative judgment and "clearly expressed . . . preference for residency requirements that would ensure that the Board members were knowledgeable of and responsive to the diverse interests of the various

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out and the fact that in many elections the first choice of minority voters was not the minority candidate *Alonzo*, 68 F.3d at 947.

[96] *Id.* at 423-24. The court also stated that "heated, hard fought campaign[s] will turn out voters both black and white." *Id.* at 424.

[97] 35 F.3d 921 (4th Cir. 1994), *cert. denied*, ___ U.S. ____, 115 S. Ct. 1097 (1995).

[98] *Cane*, 35 F.3d at 923.

[99] *Id.* at 928-29. In addition, the court held that "even when the legislative body fails to offer a remedy or its proposed remedy is legally unacceptable, the court, in exercising its discretion to fashion a remedy that complies with § 2, must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme or the legally unacceptable remedy offered by the legislative body." *Id.* at 928; *see also* White v. Weiser, 412 U.S. 783, 795-97 (1973) (holding that federal courts should intrude upon state policy no more than is necessary but that courts should not forbear from providing remedy necessary to redress constitutional violations already adjudicated and in need of correction).

regions of the [c]ounty."[100] As the court stated:

> In adopting the cumulative voting plan . . . , the district court failed to defer to this expressed legislative preference. It abolished the residency districts, imposing a plan that would permit all five seats on the Board to be filled by individuals living in the same general area of the County. In sum, it failed to adequately defer to the "variety of political judgments about the dynamics of [the] overall electoral process that rightly pertain[ed] to the legislative prerogative of" the County.[101]

8. Nipper v. Smith

In *Nipper v. Smith*,[102] the district court rejected section 2 claims asserted by black registered voters and by black attorneys who had challenged Florida's system for electing judges in the Fourth Judicial Circuit Court and in Duval County.[103] After a panel of the Eleventh Circuit reversed and remanded, the Eleventh Circuit granted rehearing *en banc*, whereby the Court of Appeals held that the state's interest in maintaining its judicial elections scheme precluded implementation of proposed remedies and precluding the granting of relief.[104] The court stated "that the factors relevant in the totality of the circumstances analysis under section 2 in the legislative context

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[100] *Cane*, 35 F.3d at 928.

[101] *Id.* at 929 (citing McGhee v. Granville County, 860 F.2d 110, 115 (4th Cir. 1988)).

[102] 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, ___ U.S. ____, 115 S. Ct. 1795 (1995).

[103] *Nipper*, 39 F.3d at 1496-97. Appellants challenged the Florida system of electing judges because they claimed the system diluted the voting strength of the black minority. *Id.* at 1504. In both the Fourth Judicial Circuit and Duval County, all black candidates for office had been defeated by white opponents. *Id.* at 1508. Appellants asserted that § 2(a) of the Voting Rights Act should outlaw the election practices in Florida because they contended it resulted in racial discrimination. *Id.* at 1509-10.

[104] *Id.* at 1497. The Eleventh Circuit panel concluded that the evidence showed racially polarized voting in the Fourth Judicial Circuit and Duval County, therefore a § 2 violation. *Id.* at 1497-98; *see also* Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419, 426 (1991) (stating that election of state trial judges is within coverage of Voting Rights Act).

might not be relevant for judicial elections."[105] The court also emphasized the critical role played by the existence of a workable and feasible remedy when considering whether or not liability can be imposed under the totality of the circumstances in a section 2 case, stating:

> [F]rom the inception of a section 2 case, the existence of a workable remedy within the confines of the state's system of government is critical to the success of a vote dilution claim. The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a finding of liability . . . . [T]he possibility of an acceptable remedy is essential to a successful section 2 vote dilution claim; . . . [a]bsent such a showing, there can be no section 2 relief because, "[u]nless these points are established, there neither has been a wrong nor can [there] be a remedy." [T]hese requirements are equally applicable to judicial, legislative and executive branch cases.[106]

Finally, in a passage which could have been extracted directly from *Miller v. Johnson*,[107] the Eleventh Circuit concluded that the plaintiff's proposed remedial options of electoral subdistricts, creation of new majority-minority circuit courts, and a cumulative voting system, "would encourage racial bloc voting, [and] . . . necessarily fuel the notion that judges were

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[105] *Nipper*, 39 F.3d at 1529; *see* Chisom v. Roemer, 501 U.S. 380, 403 (1991) (discussing problem in applying "totality of circumstances" factors to judiciary). The court discussed how difficult it would be to consider vote dilution in different kind of election settings. *Nipper*, 39 F.3d at 1529; *see generally* Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823, 832-41 (1994) (discussing § 2 and its applicability to judicial elections).

[106] *Nipper*, 39 F.3d at 1533-34 (quoting Growe v. Emison, 507 U.S. 25, 40-41 (1993) (citation omitted)). The court ruled[106] that a determination that a minority group had been impermissibly diluted cannot be shown unless an alternative electoral structure is in mind for comparison. *Id.* at 1533. The court also stated that for a vote dilution claim to succeed, a minority group must demonstrate "the existence of significant white bloc voting" and not just that it has less opportunity than others to elect the representative of their choice. *Id.* at 1533-34.

[107] ___ U.S. ____, 115 S. Ct. 2475 (1995).

influenced by race when administering justice."[108] The court also stated that in fashioning and implementing such an altered electoral scheme "would be proclaiming that race matters in the administration of justice."[109] Concluding that such an explicit policy of racial assignments and race-conscious remedies would tend to entrench the very racial stereotypes that the Voting Rights Act prohibits, the court ruled that because the appellants' remedies could not be recognized without upsetting the administration of justice, no section 2 relief should be granted.[110]

9. Clay v. Board of Education of St. Louis

Dr. Ronald Weber's expert testimony, in *Clay v. Board of Education*,[111] was a central factor in the district court's holding that Plaintiffs failed to satisfy the *Gingles* threshold requirements for a successful section 2 challenge to the at-large system for electing members to the St. Louis' Board of Education.[112] In his analysis of white bloc voting, Dr. Weber identified the minority-preferred candidates in all contested board elections since 1977 and all exogenous elections since 1986, in which at least one African-American candidate participated.[113] His statistical method and data found that black voters elected "their preferred candidates to the [b]oard 57.9% of the time, [and moreover,] when [blacks] voted cohe-

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[108] *Nipper*, 39 F.3d at 1546. The court stated that these offered remedies of the appellants would be contrary to the Equal Protection Clause. *Id.*

[109] *Id.* The court stated that if the appellants' remedies had been implemented, "justice would not remain colorblind" to either the public or to the litigants. *Id.*

[110] *Id.* at 1546-47. The court stated that none of the remedies offered by the appellants were valid because they undermined the administration of justice. *Id.*

[111] 896 F. Supp. 929 (E.D. Mo. 1995).

[112] *Clay*, 896 F. Supp. at 940-41. The court preferred the defense expert, Dr. Weber, over the expert offered by the appellants because "Dr. Weber utilized statistical analysis to estimate how voters of a given race cast their ballots" instead of trying to estimate how each individual voted. *Id.* at 940.

[113] *Id.* at 934-35. Dr. Weber attained this data by using "a bivariate ecological regression analysis ('BERA') . . . [which looks at] the total vote won by each candidate in a particular precinct as a dependent variable and the percentage of the precinct's voting age population, which is African-American or white, as the independent variable." *Id.* at 934.

sively, they were able to elect their preferred candidate to the [b]oard 80% of the time."[114] After finding that the plaintiffs had failed to prove legally significant white racial bloc voting, the court turned to the totality of circumstances and addressed the Senate Report factors, including past history of discrimination and its effect upon black access and participation.[115] Plaintiffs, however, relied on evidence of low minority voter turnout to support their contention that past discrimination impaired their access and ability to participate in the political process.[116] The district court reasoned that past discrimination and socio-economic factors are not relevant unless they are shown, in fact, to hinder the ability of blacks to participate in the political process.[117]

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[114] *Id.* at 941. The court found Dr. Weber's data report to be very persuasive and stated that the facts of the case did "not support a finding that 'the white majority voters vote sufficiently as a bloc to enable it . . . usually to defeat the minority preferred candidate'." *Id.* (citing Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)). In a similar case, a district court in Texas rejected a § 2 claim based on an allegation of bloc voting. Morris v. City of Houston, 894 F. Supp. 1062, 1063 (S.D. Tex. 1995). The *Morris* court rejected plaintiffs' § 2 challenge to the city of Houston's election scheme based on a failure to establish the *Gingles* preconditions, noting in particular that in the four elections relied on by plaintiffs to prove racial bloc voting, "50% of the time, Anglos supported Hispanic candidates." *Morris*, 894 F. Supp. at 1063, 1066. The *Morris* court also found that "these numbers do not support the proposition that Anglos *usually* vote as a bloc to defeat Hispanic candidates." *Id.* at 1066. The court also stated only those who vote in an in an election should be included in an assessment. *Id.*

[115] *Clay*, 896 F. Supp. at 941. The listed factors should be considered as probative of a § 2 violation. *Id.*; *see supra* notes 16 and accompanying text.

[116] *Clay*, 896 F. Supp. at 943. The court found that the fact of a low minority voter turnout was an insufficient showing of an impairment of access in the election. *Id.*

[117] *Id.* at 943. The court stated that although the defendant did admit to past discrimination in educational opportunities, there was no evidence that black persons were being denied an opportunity to participate in the election process. *Id.* The court also stated that it would not speculate about the causes of alleged minority apathy. *Id.*; *cf.* Little Rock Sch. Dist. v. Pulaski Co. Special Sch. Dist., 56 F.3d 9044, 911 (8th Cir. 1995) (finding plaintiffs failed to establish a § 2 violation where "certainly there is a history of official discrimination in Arkansas, though its present effects are less pronounced in Pulaski County").

Checklist for "Particularized Findings" in Voting Rights Act Litigation

A curious development has surfaced in the Fifth Circuit and other circuits in recent section 2 appeals by unsuccessful plaintiffs. In a trio of cases, the Fifth Circuit has vacated and remanded district court decisions rejecting plaintiffs' section 2 vote dilution claims based on lack of sufficiently particularized findings of fact and conclusions of law and after express consideration of the *Gingles* preconditions and the Senate Report factors.[118] In each case, the Fifth Circuit Court of Appeals said those findings were incomplete, too general, not sufficiently particularized, or not as comprehensive as to enable it to discharge its appellate review function.[119] Further proceedings after remand led to district court decisions in favor of the defendants in *Teague* and *Clark,* and both have again been appealed by the plaintiffs to the Fifth Circuit.[120]

The genesis of this "particularized findings" rule may be found in *Velasquez v. City of Abilene*,[121] where the court opined that while a trial court will not be required to discuss all evidence, it must discuss all "substantial evidence contrary to its opinion."[122]

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[118] *See* Houston v. Lafayette County, 56 F.3d 606, 612 (5th Cir. 1995) (holding that district court should have focused evidence of racially polarized voting on particularized findings instead of broad evidence); Teague v. Attala County, 17 F.3d 796, 798 (5th Cir. 1994) (holding that lower court should have evaluated statistical evidence about racially polarized voting more comprehensively); Clark v. Calhoun County, 21 F.3d 92, 93 (5th Cir. 1994) (stating that district court's finding regarding racially polarized voting not particularized).

[119] *See Houston*, 56 F.3d at 612 (holding that district court findings should have been more fact-specific regarding first *Gingles* precondition); *Teague*, 17 F.3d at 798 (holding that district court decision was too broad as well as not tied to testimony presented); *Clark*, 21 F.3d at 96-97 (discussing lack of particularization in district court's findings).

[120] *See* Teague v. Attala Co., No. 1:91-CV-209-D-D, slip op. at 1-2 (N.D. Miss. Mar. 20, 1995) (holding after added findings of fact that no § 2 violation existed); Clark v. Calhoun Co., 881 F. Supp. 252, 256 (N.D. Miss. 1995) (holding that although plaintiffs proved that racially polarized voting existed in Calhoun County, under totality of circumstances analysis, plaintiffs did not prove § 2 violation).

[121] 725 F.2d 1017 (5th Cir. 1984).

[122] *Velasquez*, 725 F.2d at 1020. The court found the plaintiffs had not made a

One way to meet the *Velasquez* requirement is to take full advantage, where permitted, of the opportunity often extended by District Judges pursuant to Rule 52 of the Federal Rules of Civil Procedure, namely, to draft proposed findings of fact and conclusions of law that are suitable for a published opinion.[123] Such proposed findings and conclusions should at a minimum:

1. be exquisitely detailed;
2. discuss all substantial, relevant contrary evidence with respect to each of the *Gingles* factors and each of the Senate Report factors as well as other probative evidence;
3. comprehensively tie the evidence in the record to the *Gingles* preconditions and the Senate Report factors;
4. comprehensively analyze the totality of the circumstances, including the nature and significance of the governmental interest and political policy choices underlying the electoral system at issue;
5. set forth comprehensive individual findings that reflect deliberative and contemplated decision-making, as opposed to generalizations; and
6. articulate a clear factual basis for credibility choices, both as to expert testimony and as to anecdotal evidence presented through lay witnesses.

Given the crucial role that minority electoral outcomes play in section 2 litigation, including bloc voting, racial polarization and special circumstances, defense counsel would be well-advised to prepare and maintain for each election, whether endogenous and exogenous, an individual file containing at a minimum the following facts and circumstances, together with a certified copy of the election return:

1. candidate by name and race;
2. office or position;
3. date of election;

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detailed finding of fact regarding the § 2 claim. *Id.*

[123] FED. R. CIV. P. 52. Federal Rule of Civil Procedure 52 states that a district court may make findings of fact and conclusions of law when deciding all cases tried without a jury. FED. R. CIV. P. 52. The facts and conclusions of law must be stated in sufficient detail. FED. R. CIV. P. 52.

4. type of election, i.e., primary, runoff, general, special;
5. relative qualifications of each candidate;
6. newspaper articles pertaining to the pre-election activities, platform announcements, speeches, debates, and issues analysis;
7. policies and written platforms of each candidate;
8. experience of each candidate;
9. abilities of each candidate as a speaker and public figure;
10. track records of each candidate in their respective communities;
11. name recognition of each candidate;
12. financial support of or received by each candidate, including identification of any discrete groups or organizations providing financial support or in-kind support;
13. personalities of each candidate;
14. identity of the supporters of each candidate;
15. financial report forms, campaign contribution reports and similar public documents.[124]

In addition to the above, a public records custodian, authorized by appropriate local government ordinance or resolution to do so (i.e., City Clerk, County Recorder, Chancery Clerk or Election Commission Secretary), should accumulate, maintain and, thereafter, be able to furnish in certified form the above data as a regularly kept business record or officially maintained public record, for purposes of evaluation, analysis and forensic interpretation by an appropriately qualified demographer or other expert, including the purpose of electoral evidence analysis. Such detailed data could also be summarized under Rule 1006 of the Federal Rules of Evidence and relied upon by a qualified expert in rendering opinions and conclusions on electoral outcomes, causation, the role of racial bias, and non-racial factors affecting electoral access and participa-

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[124] *See* Jeffers v. Clinton, 730 F. Supp. 196, 246 (E.D. Ark. 1989) (Eisele, J. concurring & dissenting) (stating which types of facts should be identified in § 2 claim), *aff'd*, 498 U.S. 1019 (1991); Uno v. City of Holyoke, 72 F.3d 973, 983-92 (1st Cir. 1995) (discussing evidence in relation to *Gingles* factors).

tion.[125]

CONCLUSION

Constitutional restraints on the practice of drawing race-based majority-minority districts have now been given full recognition in *Miller v. Johnson*. Moreover, in a case which contains the harshest judicial scolding for the Justice Department's maximization agenda, the United States Supreme Court has breathed life back into the formerly one-sided redistricting process for local government entities.[126]

Racial gerrymandering prior to *Shaw v. Reno* and *Miller v. Johnson* has done much to eliminate the need for competitive or swing-vote districts. Indeed, local governments should be free openly to consider race in their redistricting decisions, leading to the development of such districts, so long as race is not one of the overriding or predominant considerations.[127] Such districts, in light of crossover vote patterns and credible anecdotal evidence, may realistically provide minority citizens with equal access to the electoral process and an equal opportunity to participate in the political process.[128] Indeed, the use of such districts—whether in the legislative process or as a proffered change to comply with the one-person, one-vote constitutional standard, or in the remedial phase of Voting Rights Act litigation, should become more prevalent. This would enable local governments to further the federal interest of equal political opportunity and access, which undergirds the Voting Rights Act, while simultaneously satisfying local political, so-

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[125] FED. R. EVID. 1006. Rule 1006 stated in part that if a voluminous writing, recording, or photograph cannot be presented at court, a summary would be sufficient. FED. R. EVID. 1006.

[126] The Supreme Court recently heard oral arguments in the cases of Bush v. Vera, ___ U.S. ___, 115 S. Ct. 2639 (1995), and Shaw v. Hunt, ___ U.S. ___, 115 S. Ct. 2639 (1995). These cases will further provide the Court the opportunity to develop its strict scrutiny analysis with regard to racially gerrymandered districts and to flesh out the constitutional requirement that such plans, narrowly tailored to meet compelling governmental interests in order to withstand strict scrutiny.

[127] *See supra* notes 5, 48 and accompanying text.

[128] *See supra* note 41 and accompanying text.

cial and economic interests reflected in explicitly adopted or implicitly honored redistricting criteria.

Furthermore, given the Court's clear signal that proof of mere societal discrimination will not suffice and that more will be required of section 2 plaintiffs than generalized claims of historical discrimination not closely connected with the electoral system at issue, the time is ripe for assertion of defenses in Voting Rights Act litigation, which are intensely fact-based, which shun the demands for racial enclaves characteristic of the current civil rights agenda, and which reject racial stereotyping and anemic presumptions about racial animus that have for too long dominated redistricting litigation.[129] Such proactive defense strategies can and do succeed if they focus on the positive effects of coalition-building in a multi-racial democracy.[130]

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[129] *See supra* notes 7, 91, 94 and accompanying text.

[130] *See supra* notes 6-8, 45-55 and accompanying text; *see also* Quilter v. Voinovich, 912 F. Supp. 1006, 1023 (N.D. Ohio 1995) (declaring Ohio's 1992 legislative reapportionment plan violative of the Equal Protection Clause). The *Quilter* court based their decision in part on the district court's reasoning that the effect of a plan that deliberately packed minority voters into a district where they are unnecessary to the election of the minority's candidate of choice "is likely to be to reduce the opportunity for minority voters to coalesce with other voters to influence the election of candidates of their choice in the district from which they are drawn." *Quilter*, 912 F. Supp. at 1023.

WADING INTO THE "SERBONIAN BOG" OF VOTE DILUTION CLAIMS UNDER AMENDED SECTION 2 OF THE VOTING RIGHTS ACT: MAKING THE WAY TOWARDS A PRINCIPLED APPROACH TO "RACIALLY POLARIZED VOTING"

David D. O'Donnell[*]

I. INTRODUCTION

Three decades after the enactment of the Voting Rights Act[1] and fourteen years after section 2 of the Act was amended[2] to expand the reach of the Act by discarding the briefly fashionable "intent" test[3] in favor of a "result" test,[4] the courts continue to grapple with a dizzying array of conceptual complexities and conflicting policies inherent in the amended version of section 2 and the at-best incomplete evidentiary framework imparted by the Supreme Court in *Thornburg v. Gingles*.[5] Indeed, one court has recently described section 2 vote dilution litigation as a "Serbonian bog in which plaintiffs and defendants, pundits and policymakers, judges and justices

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[1] Voting Rights Act of 1965, PUB. L. NO. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973ff-6 (1988 & Supp. IV 1993)).

[2] 42 U.S.C. § 1973 (1982).

[3] *See infra* notes 51-54 and accompanying text.

[4] *See infra* notes 55-64 and accompanying text.

[5] 478 U.S. 30 (1986).

find themselves bemired."[6] The reasons for this less than enthusiastic characterization lie both in the text of amended section 2 and the inability of the Supreme Court to articulate, in *Gingles* and subsequent decisions,[7] a clearly workable and principled[8] evidentiary framework to be applied in resolving minority vote dilution claims.

Amended section 2 is properly viewed and applied as a statutory guarantee of the right of the minority to participate in the electoral process. It therefore offers protection against invidious barriers to a minority group's right to freely participate in the electoral process. Thus, amended section 2 expressly prohibits the use of any standard, practice, or procedure which "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color."[9] A "denial or abridgement" is proven if the evidence shows that members of the minority group have "less opportunity than other mem-

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[6] Uno v. City of Holyoke, 72 F.3d 973, 977 (1st Cir. 1995). "Serbonian bog" refers to the marshy Lake Serbonis in ancient Egypt where, "according to the ancient Greek historian Herodotus, whole armies were engulfed." Miller v. American President Lines, Ltd., 989 F.2d 1450, 1458 n.5 (6th Cir. 1993). Subsequent to Herodotus' observation, the term "Serbonian bog" was used by John Milton in his classic work *Paradise Lost* in 1667. *Miller*, 989 F.2d at 1458 n.5. However, it was Justice Cardozo's use of the term in his dissenting opinion in Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 499 (1934), that introduced "Serbonian bog" into American jurisprudence. Despite its use by jurists to describe "particularly difficult" situations, the term remains somewhat misunderstood and obscure. *See* John D. Ferrick, *Remarks Delivered on the Occasion of the Presentation of the Fordham-Stein Award to the Honorable William Hughes Mulligan*, 59 FORDHAM L. REV. 479, 483 (1991) (quoting Judge Mulligan, formerly of the Second Circuit Court of Appeals, as stating that "[nobody knows] what it means, but they know it's not good" in response to questioning about the definition of "Serbonian bog"). Characterizing vote dilution litigation as a "Serbonian bog," the First Circuit Court of Appeals intended to emphasize the "conceptual complexity that has engulfed the [Voting Rights Act]." *Uno*, 72 F.3d at 977.

[7] *See infra* notes 92-97 and accompanying text.

[8] The term "principled" is intended to refer to a legal framework which accurately reflects the language and intent of § 2, as amended, which was designed to insure full and unfettered access to the electoral processes by ethnic and racial minorities, by removing barriers and practices within the electoral scheme which have a deleterious effect on minorities "as minorities" (that is, because of their status as a racial or ethnic minority).

[9] 42 U.S.C. § 1973(a) (1982).

bers of the electorate to participate in the political process and to elect representatives of their choice."[10] Section 2 then identifies the "extent to which members of a protected class have been elected to office" as the principal evidence of minority "access" or "lack of access," but then emphasizes that the section is not to be construed as establishing "a right to have members of a protected class elected in numbers equal to their proportion in the population."[11] Thus while the cognizable right of section 2, as amended, is "equality of opportunity" of the minority electorate, not a right of proportionate electoral success for minority candidates, the essential rub of section 2 is that the success of minority candidates is deemed the principal indicator of minority access, while a right to proportional representation is expressly disavowed.[12]

Aside from the tension inherent in the language of section 2, as amended, the Supreme Court's inability to articulate a comprehensive and principled evidentiary framework to be applied in resolving minority vote dilution claims has also engendered confusion among the lower courts. In *Gingles*, the Supreme Court clarified the evidentiary framework to be applied in section 2 vote dilution claims by establishing a three-part set of necessary, but not determinative, preconditions requiring proof that (1) the minority electorate "is sufficiently large and geographically compact to constitute a majority in a single member district," (2) the minority electorate is "politically cohesive" and (3) that there exists racially polarized voting which usually results in the defeat of the minority-preferred candidate.[13] Despite this effort at clarifying the evi-

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[10] 42 U.S.C. § 1973(b) (1982).

[11] 42 U.S.C. § 1973(b) (1982).

[12] *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) (O'Connor, J., concurring) (criticizing Justice Brennan's definition of "vote dilution" as creating "what amounts to a right to usual, roughly proportional representation on the part of sizable, compact, cohesive minority groups"). Justice O'Connor went on to say that "the Court's test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in section 2." *Gingles*, 478 U.S. at 94 (O'Connor, J., concurring).

[13] *Id.* at 50-51. The Court stated that the three factors were "necessary pre-

dence required to support a section 2 vote dilution claim, the Court was unable to articulate a workable evidentiary definition of such key terms as "minority political cohesion"[14] and "legally significant racial bloc voting."[15] For example, while the language of amended section 2 expressly prohibits the use of voting procedures which result in infringements on a minority group's access to the electoral system "on account of race or color," the *Gingles* Court was sharply divided over whether evidence tying the regular defeat of minority-preferred candidates to racial animus in the majority electorate was at all relevant to the racial bloc voting calculus.[16] Lower courts have therefore been largely left on their own in assessing the relevance of a wide range of evidence, both statistical and

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conditions" to establishing that "minority voters' ability to elect representatives of their choice" was impaired. *Id.* at 50. However, the Court did not state that the mere satisfaction of these three factors would conclusively determine that a § 2 violation had occurred.

[14] The lower courts have defined "minority political cohesion" in various ways. For example, some have determined that this precondition requires a high degree of uniformity in the socio-economic status and cultural life of the minority community. *See, e.g.*, Gomez v. City of Watsonville, 863 F.2d 1407, 1414-16 (9th Cir. 1988) (considering expert testimony regarding socioeconomic differences among minority voters, with conclusion that minority group was too apathetic to be considered politically cohesive). Other courts have found this precondition satisfied by proof that the minority electorate regularly engages in racial bloc voting. *See* Sanchez v. Bond, 875 F.2d 1488, 1493 (10th Cir. 1989) (stating polarized voting by minority community is proof of political cohesion); *see also* Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988) (holding minority group is politically cohesive if it votes together); Collins v. City of Norfolk, 816 F.2d 932, 935 (4th Cir. 1987) (holding evidence of polarized voting by minority community sufficient to establish minority political cohesion).

[15] The Supreme Court in *Gingles* refused to enunciate a "simple doctrinal test for the existence of legally significant racial bloc voting" because "the degree of racial bloc voting that is cognizable as an element of a section 2 vote dilution claim will vary according to a variety of factual circumstances." *Gingles*, 478 U.S. at 57-58.

[16] *See id.* at 64 (discussing race of voter as primary determinant of voter behavior); *id.* at 83-84 (White, J., concurring); *id.* at 99-100 (O'Connor, J., concurring) (arguing that "[e]vidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates").

anecdotal, of equally wide ranging quantitative and qualitative value. Without adequate guidance, the lower courts have routinely found plaintiffs to have satisfied the racial bloc voting inquiry based on evidence of dubious significance which simply noted "differences" in the voting patterns of the majority and minority electorate, which coincided with a lack of proportionate success of the minority-preferred candidate, without further requiring proof that the losses experienced by the minority-preferred candidate were due to racial animus in the majority electorate.[17] The failure to tie the lack of success of minority-preferred candidates to racial animus in the majority electorate—and indeed the rejection of evidence of the causes (racial or race-neutral) of voting behavior as "irrelevant"—has transformed the right of access established by section 2 into a right of proportional representation.[18] This construction has raised increasing concerns over the constitutionality of section 2 as applied.[19]

Fidelity to the statutory language, legislative history, and the "results test" codified in amended section 2 requires that a

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[17] *See infra* notes 98-104 and accompanying text.

[18] *See Gingles*, 478 U.S. at 86 (O'Connor, J., concurring). Justice O'Connor stated that "although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." *Id.*

[19] Because § 2 was enacted pursuant to the Fourteenth and Fifteenth Amendments as a remedy for pervasive discrimination in the polity, a reading of § 2 which would permit a finding of a violation without a showing that minority losses were caused by "race" would be constitutionally suspect. *See* Nipper v. Smith, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc) (noting that vote dilution claims require more than "a mere showing of electoral losses at the polls by minority candidates"); *see also* League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 854 (5th Cir. 1993) [hereinafter *LULAC v. Clements*] (en banc) (observing that "Senate Report explained that the 1982 Amendments avoided constitutional difficulty because the very terms and operation of [§ 2] confine its application to actual racial discrimination."); Reed v. Town of Babylon, 914 F. Supp. 843, 891-92, (E.D.N.Y. 1996) (holding plaintiff's Fourteenth and Fifteenth Amendment claims failed because no facts were asserted which would have allowed Court to infer discriminatory intent).

finding of "legally significant racial bloc voting" be based on evidence that the losses experienced by the minority-preferred candidates is due to racial animus or "invidious" behavior by the majority electorate. Indeed, fourteen years after section 2 was amended, the courts are just now beginning to realize that the failure to link minority electoral loss to majority racial animus has transformed section 2 into a right of proportional representation; thus recent decisions from the First, Fifth, and Eleventh Circuits have expressly acknowledged the overriding relevance of evidence explaining the causes of perceived voting patterns.[20]

The purpose of this Article is to suggest a more refined and principled approach to the racial bloc voting inquiry established by *Gingles*; an approach which will better serve the underlying goal of section 2 of insuring minority group access while avoiding the statutory proscription against the creation of a right of proportional representation. The first part of this article will briefly examine the conceptual underpinnings of section 2, as amended, by examining the development of the "results" test codified by the 1982 amendments, its legislative history, and an analysis of the *Gingles* decision which represented the Supreme Court's first concerted effort to provide an evidentiary framework for use in assessing minority vote dilution claims under section 2, as amended.[21] The second part of this article reviews the lower courts' application of the *Gingles* evidentiary framework, and, in particular, the "racially polarized voting" inquiry.[22] The third part of the article examines the recent evolution of the racially polarized voting inquiry. The trend among the lower courts suggests that plaintiffs must now prove that the lack of electoral success of minority-preferred candidates is due to racial animus within the majority electorate in order to demonstrate the existence of legally significant majority bloc voting.[23]

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[20] *See infra* notes 106-141 and accompanying text.
[21] *See infra* notes 24-97 and accompanying text.
[22] *See infra* notes 98-105 and accompanying text.
[23] *See infra* notes 106-71 and accompanying text.

II. The Evolution of Minority Vote Dilution Claims and the Results Test Under Section 2

The remedial force of section 2 of the Voting Rights Act[24] was easy enough to apply in removing the more readily identifiable impediments to minority access to the electoral process such as the poll tax,[25] literacy tests,[26] white candidate slating,[27] and other discriminatory barriers to minority access.[28] Over the course of time these barriers were eventually eliminated from the electoral landscape and the courts began to turn their attention to claims of "minority vote dilution,"[29]

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[24] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973ff-6 (1988 & Supp. IV 1993)).

[25] The Supreme Court proscribed the use of a poll tax in all elections in Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

[26] While literacy tests were not aimed specifically at blacks, in 1890 nearly 75% of blacks were illiterate while the corresponding average among whites was less than 20%. For an in-depth discussion of early impediments to minority access to the electoral process, see James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, *in* Quiet Revolution in the South 351, 354-56 (Chandler Davidson & Bernard Grofman eds., 1994).

[27] Slating groups that control the nomination process in a jurisdiction can insure that minority candidates are not nominated, or that minority candidates represent majority interests. *See generally* Chandler Davidson & Luis R. Fraga, *Nonpartisan Slating Groups in an At-Large Setting* in Minority Vote Dilution 119 (Chandler Davidson ed., 1984).

[28] Other common forms of direct barriers included preregistration requirements or threats of violence. Alt, *supra* note 26, at 361.

[29] According to the Senate Report accompanying the 1982 amendments to § 2 of the Voting Rights Act,

> the principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*. The Supreme Court based its ruling on the fundamental view that the "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." In defining the basic dilution principle, the Supreme Court observed: "there is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected rights suffers substantial dilution . . . where a favored group has full voting strength . . . [and] [t]he

that is, that the operation of certain electoral structural schemes, combined with past and present social and economic conditions, caused minorities to suffer a "diminution" in their collective voting strength and hence their relative opportunity to participate in the electoral process, even though the direct barriers to participation had been removed.[30]

The Supreme Court first considered the viability vel non of minority group vote dilution claims in the case of *Whitcomb v. Chavis*,[31] which involved a claim by black citizens that the use of a multi-member[32] state legislative districting scheme unconstitutionally diluted their voting strength.[33] The Court gave credence to the "vote dilution" theory advanced by the plaintiffs, holding the appropriate inquiry to be whether the lack of success of minority candidates, in relation to their proportionate share of the general population, was attributable to the minority electorate having less opportunity than other voting groups "to participate in the political process and to elect legislators of their choice."[34] Finding that the plain-

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groups not in favor have votes discounted."

See S. Rep. No. 417, 97th Cong., 2d Sess. 19-20 (1982) *reprinted in* 1982 U.S.C.C.A.N. 196.

[30] In her concurring opinion in *Gingles*, Justice O'Connor aptly observed that "[i]n order to evaluate a claim that a particular multi-member district or single-member district has diluted the minority group's voting strengths to a degree that violates Section 2, however, it is also necessary to construct a measure of 'undiluted' minority voting strength." *Gingles*, 478 U.S. at 88-89 (O'Connor, J., concurring). "[T]he phrase [vote dilution] itself suggest a norm with respect to which the fact of dilution maybe ascertained." *Id.* (O'Connor, J., concurring) [citation omitted]. "Put simply, in order to decide whether an electoral system had made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Id.* (O'Connor, J., concurring).

[31] 403 U.S. 124 (1971).

[32] A multi-member electoral scheme consists of a single electoral district which is represented by two or more officials. According to the number of positions accorded the multi-member district, voters are entitled to cast a separate vote for each position.

[33] *Whitcomb*, 403 U.S. at 128. The plaintiffs alleged that the districting plan had the effect of diluting the vote of "[n]egros and poor persons" living within a portion of the county known as the "ghetto area." *Id.* at 128-29.

[34] *Id.* at 149. The court stated that the fact that the ghetto residents did not have proportional representation in the legislature was not, by itself, evidence of

tiffs failed to demonstrate an actionable "vote dilution" claim under the Fourteenth Amendment, the *Whitcomb* Court held that absent evidence of a lack of access to the political system, the lack of proportionate representation was insufficient, in itself, to establish a constitutional violation.[35] While the Court recognized that the at-large electoral scheme caused the voting power of the minority electorate to be "cancelled out," as measured by the lack of proportionate success of the minority candidates,[36] the Court held that, without proof that the minority electorate had "less opportunity" than other similar groups in the electoral scheme to participate in the electoral process, because of their status as the "minority" electorate, an actionable claim could not be stated under the Equal Protection Clause.[37] The proof showed that there were "strong differences" between the minority electorate and nearby communities in terms of housing conditions, income and educational levels, rate of unemployment, juvenile crime, and welfare assistance[38] and that the minority electorate voted heavily Democratic, while the district's white majority electorate regularly voted for the Republican candidates, usually resulting in the defeat of the minority-preferred candidates.[39] Not finding any structural impediments to minority access to the political process,[40] the Court concluded that the failure of

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"invidious discrimination." *Id.*

[35] *Id.* at 149-50. Referring to the trial court record, the Court held that it could find no evidence that the minority electorate was prevented from voting or registering to vote. *Whitcomb*, 403 U.S. at 149.

[36] *Id.* at 153. However, the Court noted that the "cancelling out" of the minority's voting power was a "mere euphemism for political defeat at the polls." *Id.*

[37] *Id.* at 150. *See supra* notes 33-34 and accompanying text.

[38] *Whitcomb*, 403 U.S. at 132. The Court cited these non-racial factors to contrast the interests of the "ghetto area" with those of other areas of the county. *Id.* However, despite these "strong differences," the Court noted that all areas of the county shared an interest in topics "such as metropolitan transportation, flood control, sewage disposal, and education." *Id.*

[39] *Id.* at 151-53. In highlighting that the ghetto voted Democratic and the remainder of the county voted Republican, the Court noted that although the Republican party did "not always slate ghetto candidates," it had done so on a few occasions. *Id.* at 152.

[40] *Whitcomb*, 403 U.S. at 150-51. *See supra* notes 33-35 and accompanying

the minority electorate to have legislative seats in numbers equal to its proportionate share in the general population emerged "more as a function of losing elections than of built-in bias against" a minority electorate.[41]

Thus, in *Whitcomb*, the Supreme Court assessed the plaintiff's minority vote dilution claim by scrutinizing impediments to access of the minority electorate to the political process, and ultimately determined that although there was an obvious lack of proportionate representation, the losses experienced by the minority candidates were not attributable to the candidate's status as the "minority preferred candidate" but rather were the function of race-neutral choices by the majority electorate, that is, the party affiliation of the candidates involved in a given election.[42]

Two years later, in *White v. Regester*,[43] the Supreme Court again confronted a minority vote dilution challenge to a multi-member districting scheme, but this time determined that the operation of the electoral scheme impermissibly "diluted" the minority electoral strength.[44] The Court reiterated the standard established in *Whitcomb*, that a minority group must prove "that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[45] In *White*,

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text.

[41] *Whitcomb*, 403 U.S. at 154. The Court observed that it is typical in American legislative elections that "one candidate wins, the others lose." *Id.* at 153. In rejecting the plaintiff's equal protection argument, the Court concluded that "we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so called 'safe' districts where the same party wins year after year." *Id.*

[42] *Id.* at 154. The Court held that poor blacks in the ghetto were "no more underrepresented than poor ghetto whites who also voted Democratic and lost." *Id.*

[43] 412 U.S. 755 (1973).

[44] *White*, 412 U.S. at 769-70. Based on the facts presented at the trial court level, the Court held that the "multimember district, as designed and operated" had the effect of "invidiously exclud[ing] Mexican-Americans from effective participation in political life." *Id.* at 769.

[45] *Id.* at 765-66. The Court held that the political processes in the district in question were "in violation of all the *Whitcomb* standards." *Id.* at 769.

the Supreme Court for the first time applied a "totality of the circumstances" test[46] to the minority's vote dilution claim and found that the past and present acts of discrimination against the minority electorate, conjoined with the operation of the multi-member districting scheme, impermissibly diluted the minority electorate's voting strength.[47] According to the Court, the "fundamental" aspect of the plaintiff's minority vote dilution claim consisted of proof that the minority electorate was actively and effectively excluded from the slating, nominating, and electoral processes.[48] Thus, although the Court found that the more objective attributes of the multi-member electoral scheme, such as the majority vote requirement and the multi-member district itself, were not "in themselves improper nor invidious,"[49] they exacerbated the effect of the truly invidious and discriminatory efforts existing at other points in the electoral process which combined to exclude or minimize minority access to the electoral process.[50]

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[46] *Id.* at 769. In affirming the district court's findings, the Court noted that the district court "evolved its ultimate assessment" based on "the totality of the circumstances." *White*, 412 U.S. at 769. Unlike the plaintiffs in *Whitcomb*, who had relied solely on the lack of proportional representation of minorities as proof of dilution, here they showed: "(1) a history of official discrimination against blacks in Dallas and Mexican-Americans in Bexar; (2) the existence of a white slating group and racial campaign tactics in Dallas; (3) cultural and language barriers and depressed voter registration in Bexar; (4) a lack of responsiveness by elected officials to the needs of the minority community in Bexar; and (5) numbered post and majority vote requirements in both jurisdictions." Laughlin McDonald, *The Quite Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1260-62.

[47] *White*, 412 U.S. 767-68. As noted by the Court, one glaring example of the minority's ineffectual voting strength in Bexar County was that since 1880 only five Mexican-Americans from that county had have served in the Texas Legislature. *Id.* at 768-69. Mexican-Americans made up approximately 29% of the county's total population. *Id.* at 768.

[48] *Id.* at 767-68. The Court held that the local Democratic party's actions in excluding minorities from the primary selection process had the effect of barring them from "enter[ing] into the political process in a reliable and meaningful manner." *Id.* at 767.

[49] *White*, 412 U.S. at 766. However, although the Court did not find the multimember district to be "improper" or "invidious" by itself, it concluded that such arrangement "enhanced the opportunity for racial discrimination." *Id.*

[50] *Id.* at 767. *See supra* notes 44-45 and accompanying text.

In 1980, the Supreme Court rejected the "results" test of *White* and *Whitcomb*, substituting an "intent" test to be applied in deciding minority vote dilution claims under section 2 and the Fourteenth and Fifteenth Amendments. In *City of Mobile v. Bolden*,[51] the Supreme Court determined that proof of an invidious purpose by the government in the adoption and maintenance of the challenged electoral scheme was essential to a minority vote dilution claim brought under section 2 and the Constitution.[52] The Court found that an analysis of the *Zimmer v. McKeithen*[53] factors, which were devised to give definition to the "totality of the circumstances" test of *White v. Regester*, were "relevant," but insufficient to establish the existence of a "discriminatory purpose" behind the government's continued maintenance of the electoral scheme.[54] Congress reacted quickly to the *Bolden* decision by amending section 2 of the Voting Rights Act in 1982 to provide that electoral procedures and practices that "result in" the denial or abridgement of the minority electorate's access to the electoral processes is violative of section 2 of the Act.[55] The legislative history provided in the Senate Report accompanying the 1982 amendments to section 2 expressly states that

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[51] 446 U.S. 55 (1980).

[52] *Bolden*, 446 U.S. at 66. In addition to stating the requirement that the plaintiff show intentional discrimination in order to make a § 2 claim, the Court reiterated that a mere lack of proportional representation was not sufficient to prove discrimination. *Id.* at 66 (citing *White*, 412 at 765-66).

[53] 485 F.2d 1297 (5th Cir. 1973) (en banc). In *Zimmer*, the Fifth Circuit applied a refined version of the *Whitcomb-White* evidentiary framework in upholding a minority vote dilution claim against a Louisiana at-large voting scheme. *Zimmer*, 485 F.2d at 1305. The Court identified four primary factors for use in resolving claims of vote dilution; (1) a lack of access to the process of slating candidates; (2) the unresponsiveness of legislators to their particularized interests; (3) a tenuous state policy underlying their preference for multimember or at-large districting; and (4) the existence of past discrimination in general that precluded effective minority participation in the election system. *Id.*

[54] *Bolden*, 446 U.S. at 74. The Court held that the *Zimmer* criteria alone were insufficient to prove an unconstitutionally discriminatory purpose. *Id.* at 73. Subsequently, the Court would clarify its feelings regarding the *Zimmer* approach, describing it as a "highly amorphous theory." *See* Wise v. Lipscomb, 437 U.S. 535, 550 (1978).

[55] *See* 42 U.S.C. § 1973 (1982).

Congress intended to "codify" the results test articulated and employed in *Whitcomb* and *White*.[56] In enacting the amended version of section 2, Congress retained much of the original version of the section, including the provision restricting relief under section 2 to "denials or abridgements of the right . . . to vote on account of race or color."[57] The Senate report makes clear that by amending section 2 Congress intended to encompass "minority vote dilution claims" within the proscriptions of the section,[58] while broadening the potential scope of the Act by specifically rejecting the *Bolden* intent test in favor of the results test illustrated in the *White* and *Whitcomb* decisions.[59]According to the Senate Report, a proper application of the results test requires courts to "distinguish between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not."[60] The Report expands upon the results test of *Whitcomb* and *White* by listing various factors which the courts should apply in assessing vote dilution claims.[61] Thus, in addition to assessing the relative access of the minority electorate to the political processes, by examining the success rates of minority candidates for political office,[62] the Report directed courts to examine the actual voting practices of the minority and majority electorates, which the Report referred to as "racial bloc voting": an

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[56] *See* S. Rep. No. 417, 97th Cong. 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 205 (stating that "despite the plurality opinion in *Mobile* that *White* involves an 'ultimate' requirement of proving discriminatory purpose, the specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose").

[57] *See* 42 U.S.C. § 1973 (1982).

[58] *See* S. Rep. 417 at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205.

[59] *See* S. Rep. 417 at 2, 20-23, 32-33, *reprinted in* 1982 U.S.C.C.A.N. at 197-201, 210-11; *see also Gingles*, 478 U.S. at 97 (O'Connor J., concurring) ("in enacting Section 2 Congress codified the 'results' test this court had employed, as an interpretation of the 14th Amendment, in *White* and *Whitcomb*"); Jones v. City of Lubbock, 727 F.2d 364, 379 (5th Cir. 1984) (the amended § 2 "codifies pre-*Bolden* voting dilution law").

[60] *See* S. Rep. 417 at 33, *reprinted in* 1982 U.S.C.C.A.N. at 211.

[61] *See* S. Rep. 417 at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07.

[62] *Id.*

inquiry not found in either *White* or *Whitcomb*.[63] According to the Report, a finding that "race" was the predominant determinate of political preference within a given electoral scheme was essential to a successful section 2 vote dilution claim.[64]

Section 2, as amended, was interpreted by the Supreme Court for the first time in 1986 in *Thornburg v. Gingles*.[65] The Court essentially clarified the elements of an actionable minority vote dilution claim under amended section 2 by devising a three part set of preconditions which the Court deemed to be necessary, but not in and of themselves sufficient, to establish a minority vote dilution claim.[66] First, the minority electorate must demonstrate that they are sufficiently numerous and geographically compact to constitute a majority-minority single member district.[67] Second, the minority electorate must be "politically cohesive."[68] Third, there must a showing that the majority electorate consistently votes as a block so as to regularly result in the defeat of the minority-preferred candidate.[69] The first two *Gingles* preconditions are essentially "remedy oriented" in the sense that the minority electorate must retain the attributes of a distinct political group within the general electorate, and that they are sufficiently large to form an effective voting majority in a proposed reconfigured single member districting scheme.[70] The third

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[63] *Id.*

[64] *See* S. Rep. 417 at 148, *reprinted in* 1982 U.S.C.C.A.N. at 321; *see also* LULAC v. Clements, 999 F.2d 831, 855 (5th Cir. 1993) ("the Senate Report, again following *Whitcomb*, accorded this inquiry into 'racial bloc voting,' that is, whether 'race is the predominant determinate of political preference,' dispositive significance").

[65] 478 U.S. 30 (1986).

[66] *Gingles*, 478 U.S. at 49-50.

[67] *Id.* at 50.

[68] *Id.* at 51.

[69] *Id.*

[70] *See* Growe v. Emison, 507 U.S. 25, 40 (1993) (noting that "geographic compactness" and "minority political cohesion" are necessary "to establish that the minority has the potential to elect a representative of its own choice in some single-member district"); *see also* Nipper v. Smith, 39 F.3d 1494, 1510-11 (11th Cir. 1994) (en banc) (describing *Gingles*' first two preconditions as asking "whether the court can fashion a remedy for a demonstrated abridgement" of amended §

precondition, that is, "white bloc voting," was elevated by the *Gingles* Court to a central and essential role within the minority vote dilution inquiry.[71] Proof of the third precondition involves a two-step process of identifying the "minority-preferred candidate" and then an examination of the majority voting patterns in relation to the success or the non-success of the minority-preferred candidate. Although a majority of the justices united behind Justice Brennan's majority opinion regarding the formulation of the three "preconditions,"[72] a majority of the justices rejected Justice Brennan's proposed evidentiary standard for proving the existence of white bloc voting.[73]

Five of the justices thoroughly rejected Justice Brennan's construction of the "racial bloc voting" inquiry, which would have permitted a finding of "legally significant white bloc voting" based solely on a showing that the majority and minority electorate generally gave their votes to different candidates, and which rejected proof of the "causes" of perceived white bloc voting patterns as "irrelevant."[74] Five of the justic-

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[71] *Gingles*, 478 U.S. at 51. Curiously, some courts have held that an ethnic or "minority" population which forms a majority of the electorate is not thereby precluded from pursuing relief under § 2. *See, e.g.*, Salas v. Southwest Tex. Jr. Col. Dist. 964 F.2d 1542, 1555 (5th Cir. 1992) (stating that "[a]lthough a registered voter majority class faces an obvious, difficult burden in proving that their inability to elect results from white bloc voting, they are not precluded, as a matter of law, from seeking to prove such a claim").

[72] *Id.* at 34.

[73] *Id.* at 82-83.

[74] *Id.* at 83 (White, J., concurring); *Id.* at 100-01 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J., concurring). Justice White stated in his concurring opinion that under the test employed in Justice Brennan's analysis, "there is polarized voting if the majority of white voters vote for different candidates than the majority of the black voters, regardless of the race of the candidates. I do not agree. Suppose an eight-member multi-member district is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. . . . This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it

es instead clearly favored an inquiry into the possible explanations of perceived majority voting patterns.[75] For example, distinguishing between the "minority political cohesion"[76] and white bloc voting inquiries, Justice O'Connor believed that analysis of the underlying causes of white bloc voting patterns was necessary for two reasons.[77] First, such evidence was clearly relevant in answering the question of whether bloc voting by white voters would consistently result in the defeat of minority candidates.[78] Obviously, according to Justice O'Connor, such evidence would suggest that a different minority candidate, equally preferred by the minority group, might be able to attract greater white support in future elections if the voting behavior of the majority electorate was not tied to "racial animus" but was, instead, attributable to other "race-neutral" factors.[79] Second, such evidence would also be rele-

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seems quite at odds with the discussion in Whitcomb v. Chavis, 403 U.S. 124, 149-60 (1971)." *Gingles*, 478 U.S. at 83 (White, J., concurring).

Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, agreed with Justice White that "legally significant racial bloc voting" is not demonstrated where the "divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. . . ." *Id.* at 100 (O'Connor, J., concurring).

[75] *See supra* note 73.

[76] Justice O'Connor agreed that "statistical evidence of divergent racial voting patterns . . . admitted solely to establish that the minority group is politically cohesive" could not be rebutted by evidence that the voting patterns "may be explained in part by causes other than race." *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring). She disagreed with Justice Brennan, however, regarding the third *Gingles* factor. *Id.* (O'Connor, J., concurring). Justice O'Connor wrote, "I believe Congress also intended that explanations of the reasons *why* white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Id.* (O'Connor, J., concurring) (emphasis added).

[77] *Id.* at 100-101 (O'Connor, J., concurring).

[78] *Id.* at 100 (O'Connor, J., concurring).

[79] *Id.* at 100-101 (O'Connor, J., concurring). According to Justice O'Connor, "the overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring). Such a rule would give no effect whatever to the Senate Report's repeated emphasis on 'intensive racial politics,' on 'racial political considerations, and on whether 'racial politics . . . dominate the electoral process' as one aspect of the 'racial bloc voting' that Congress deemed relevant to showing a Section 2

vant to the "likelihood that candidates elected without decisive minority support would be willing to take the minority's interest into account."[80]

The Court in *Gingles* also had opportunity to consider the validity and relevance of the statistical evidence offered before the trial court in support of the racially polarized voting inquiry.[81] The Court noted that the trial court "relied principally" on extreme case analysis[82] and bivariate ecological regression statistical evidence[83] in assessing "how" the minority and ma-

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violation." *Id.* at 101 (O'Connor, J., concurring).

[80] *Id.* at 100 (O'Connor J., concurring).

[81] *Id.* at 52-54.

[82] Extreme case analysis, also referred to as "homogenous precinct analysis," examines levels of participation and voting behavior within voting precincts where over 90% of the voting age population are members of either a racial or ethnic minority group or, conversely, a white majority group. Once the minority and white homogeneous precincts are identified, "the analyst compares the level of participation in the votes cast for different candidates within each group of precincts. The figures derived from these homogeneous voting units serve as estimates of the behavior of all the respective group members in that political jurisdiction." Richard L. Engstrom & Michael D. McDonald *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*," 17 THE URBAN LAWYER 369, 371 (1985). The usefulness of extreme case analysis is limited as an inferential tool because the observed voting patterns in racially homogeneous areas may not be typical of voters residing in other more "racially mixed" areas for a variety of social, economic, and political reasons.

[83] Statisticians who testify as so-called "vote dilution experts" regularly employ the technique of "bivariate" or "double-equation" ecological regression analysis. Bivariate ecological regression analysis attempts to express the relationship or correlation between two variables, one "independent" and the other "dependent." In vote dilution cases, the percentage of voting age African-Americans or other minorities and the percentage of whites in a voting precinct is the "independent" variable and the votes for a given candidate from each precinct is deemed to be the "dependent" variable. Bivariate regression analysis essentially yields "estimates" of the numbers of votes casts by the respective groups for each candidate in a particular election. Once the regression analysis yields these estimates of voter behavior, a "correlation" coefficient (reported as "r") is computed which is a measure of how consistently the scores for a dependent variable, that is, the percentage of voters supporting a particular candidate, vary with the independent variable, that is, the proportion of the particular group (either minority or majority) comprising the total of the voting age population for the given precinct (usually derived from U.S. Census data figures of the voting age (18 or older) populations). The value of "r" ranges from 1.0 (a perfectly consistent positive relationship) through 0.0 (no relationship) to -1.0 (a perfectly consistent negative relationship). Thus, if the percentage of voters supporting a candidate in a precinct tends

jority electorates voted in particular elections.[84] The Court observed that the statistical techniques essentially yielded "estimates" of the voting patterns of the respective electorates, including precinct-level estimates of the percentages of members of each race who voted for minority candidates over the span of dozens of electoral contests.[85] The *Gingles* Court approved the trial court's evaluation of the presented statistical data, which included a consideration of the existence and strength of any "correlation"[86] between the race of the voter and the selection of certain candidates, whether the revealed correlation was "statistically significant,"[87] and whether the differences in minority and majority electorate voting patterns was "substantively significant."[88] Although four justices in *Gingles* agreed that the strength of the statistical evidence presented in support of the allegations of racial bloc voting was sufficient to substantiate the lower court's finding that plaintiffs had proven this prong of the *Gingles* preconditions,[89] a majority of the justices believed that this evidence did not go far enough in resolving the ultimate issue of whether the observed bloc voting by white voters would consistently defeat minority candidates, or whether the losses experienced by the minority-preferred candidates were due to "race."[90] On this issue, a majority of the justices found that inquiry into

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to *increase* as the minority percentage of the voting age population in the precinct increases, it is said there is a "positive" relationship between the two variables. If, on the other hand, the percentage of voters supporting a candidate tends to *decrease* as the minority percentage of the voting age population increases then the relationship is "negative." *See* Engstrom & Mcdonald, *supra* note 82, at 375. These statistical measures evaluate "how" voters vote-not "why" they vote the way they do in a given election.

[84] *Gingles*, 478 U.S. at 52-53.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 53-54. The concept of "statistical significance" involves a consideration of the probability that the data revealed was produced by random events as opposed to a true correlation between the independent and dependent variables measured.

[88] *Id.* at 52-54.

[89] *Gingles*, 478 U.S. at 61.

[90] *Id.* at 83 (White, J., concurring); *id.* at 100 (O'Connor, J., concurring).

the causes of such voting behavior was necessary in assessing the minority electorate's equality of opportunity as measured by the predictability of minority candidate defeat.[91]

The *Gingles* decision left many unanswered questions by failing to define such operative terms as "minority-preferred candidate,"[92] "representatives of choice,"[93] and "minority political cohesion."[94] The *Gingles* court did seem to give guidance on the issue of whether the causes underlying group voting behavior were relevant, or indeed necessary to the "legally significant racial bloc voting" inquiry. In subsequent decisions the Supreme Court extended the *Gingles* evidentiary framework to include minority vote dilution claims against judicial elections involving multi-member districting schemes,[95] vote "fragmentation"[96] claims involving single member districts, and "influence"[97] dilution claims involving apportionment schemes, but did not make use of the opportunity occasioned by these extensions to further clarify the *Gingles* preconditions.

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[91] *Id.*

[92] One court made it clear that "minority-preferred candidate" did *not* mean any candidate who draws a majority of the black (minority) vote. White v. Alabama, 867 F. Supp. 1519, 1554 (M.D. Ala. 1994). The court reasoned that such a definition would neglect "to ask whether [the minority has] the ability to vote into office a candidate whom they actually desire, not one whom they simply prefer over an alternative." *Id.*

[93] *See* NAACP v. Niagara Falls, 65 F.3d 1002, 1015 (2d Cir. 1995) (observing that "[t]he Supreme Court has not defined the term 'representatives of . . . choice'"). The *NAACP* court went on to point out how five justices in *Gingles* declined to join Blackmun's portion regarding his rationale for treating the race of the candidate as irrelevant. *Id.* at 1016. Like the five justices in *Gingles*, the *NAACP* majority disagreed with Brennan's analysis in *Gingles* and declined "to adopt an approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority voters." *Id.*

[94] *See supra* note 69 and accompanying text.

[95] *See* Chisom v. Roemer, 501 U.S. 380 (1991) (extending *Gingles* vote dilution analytical framework to challenges involving judicial election based on multi-member districting schemes).

[96] *See* Growe v. Emison, 507 U.S. 25 (1993) (minority vote dilution claim that minority group "fragmented" by drawing of single district lines in single-member districting scheme governed by *Gingles*).

[97] *See* Voinovich v. Quilter, 507 U.S. 146 (1993) (assuming for purposes of analysis that "influence" dilution claim was cognizable under § 2).

III. Racial Animus as the Linchpin of Legally Significant White Bloc Voting

The efforts of the lower courts to apply the *Gingles* evidentiary framework to minority vote dilution claims is marked largely by inconsistency in the evaluation of the expert statistical evidence presented in support of the "minority political cohesion" and "racial bloc voting" inquiries, and the lack of any consideration and indeed rejection of evidence as to the "causes" of observed voting patterns by the majority electorate. Most lower court decisions engaged in the racial bloc voting inquiry have failed to include any analysis of the causes of white or majority voter behavior and instead, pointing to *Gingles*, focused their analysis exclusively on the results of the presented bivariate regression and extreme case analysis statistics.[98] Typically, there is no analysis as to the statistical "significance" of the data presented,[99] and no consideration of the strength of the "correlations" between the racial makeup of the voting age populations in each precinct and the number of votes cast for each candidate.[100] Finally, none of the lower courts since the *Gingles* decision have considered the related issue of the "substantive significance" of the presented statistical data.[101] A plain reading of the *Gingles* decision, which

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[98] *See, e.g.*, NAACP v. City of Niagara Falls, 65 F.3d 1002, 1008-09 (2d Cir. 1995); LULAC v. Northeast Indep. Sch. Dist., 903 F. Supp. 1071, 1076-83 (W.D. Tx. 1995); Clay v. Board of Education, 896 F. Supp. 929, 934-36 (E.D. Mo. 1995); Williams v. City of Texarkana, 861 F. Supp. 756, 761-63 (W.D. Ark. 1992); Marylanders for Fair Representation, Inc., v. Schaefer, 849 F. Supp. 1022, 1049-50 (D. Md. 1994); Kane v. Worcester, 840 F. Supp. 1081, 1087-90 (D. Md. 1994); Rural West Tennessee African-Am. Affairs Counsel, Inc., v. McWherter, 836 F. Supp. 453, 457 n.5 (W.D. Tenn. 1993); East Jefferson Coalition for Leadership & Development v. Parish of Jefferson, 691 F. Supp 991, 1001-02 (E.D. La. 1988).

[99] *See, e.g.*, Cousins v. McWherter, 904 F. Supp. 686, 712 (E.D. Tenn. 1995); Meek v. Metropolitan Dade Co., 805 F. Supp. 967, 976-77 (S.D. Fla. 1992); East Jefferson Coalition for Leadership & Development v. Parish of Jefferson, 691 F. Supp. 991, 1001-02 (E.D. La. 1988).

[100] *See, e,g,* Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1059-60 (D. Md. 1994); Meek v. Metropolitan Date County, 805 F. Supp. 967 (S.D. Fla. 1992); NAACP v. City of Columbia, 850 F. Supp. 404, 418-20 (D.S.C. 1993).

[101] *Gingles*, 478 U.S. at 53.

specifically approved of the lower court's careful analysis of the strength of the statistical evidence on three levels; (1) the strength of correlation between the racial makeup of the precinct and the votes received by each candidate, (2) whether the correlation was statistically significant, and (3) whether the voting patterns were substantively significant, would stress the importance of critically examining the presented regression statistics and assessing the accuracy of what are essentially "estimates" of voter behavior.[102] A plain reading of the *Gingles* decision should also make clear that the majority of the justices rejected Justice Brennan's position that the causes underlying perceived voting patterns were "irrelevant" to the racial bloc voting inquiry.[103] Remarkably, however, several lower courts have relied on the *Gingles* decision, and specifically Justice Brennan's position, in finding that an examination of race-neutral reasons explaining the majority electorate's behavior to be irrelevant to the racial bloc voting inquiry.[104]

It should concern us that in the face of the statutory proscription against the creation of a right of proportional representation, a number of the lower courts have examined the principal evidence of "access" or "lack of access," that is, the ability of the minority electorate to elect candidates of their

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[102] *Id.* at 52-54.

[103] *Id.* at 82-83.

[104] *See, e.g.*, Jackson v. Edgefield Co. 650 F. Supp. 1176, 1194 n.1 (D.S.C. 1986) ("We believe that the *Thornburg* Court has decided that multi-variate regression analysis was not required in a Section 2 vote dilution case under the definition of racial bloc voting which the Supreme Court has adopted, for 'the addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under Section 2 and the Senate Report.'"). In *Jackson*, the district court rejected the defendant's expert's statistical analysis as "flawed" because it relied "on the interjection of a consideration of racial motive as a primary determinative cause for the racially divisive voting behavior." *Id.* at 1197. The court substantiated its rejection of the expert's testimony stating "under the definition of racially polarized voting as approved by the *Thornburg* Court, proof of white voter's racial hostility toward black candidates that is actually the cause of the voter behavior is no longer a relevant inquiry." *Id.* [citations omitted] Rather, under Section 2 and under the 'functional theory' of vote dilution, all that matters is the 'voter behavior, not its explanations.'" *Id.*

choice, based primarily on bivariate regression results and homogeneous precinct analysis without consideration of the "strengths" of the estimated voting patterns (by examination of the correlation and regression coefficients) and, indeed, without consideration of whether the statistical estimates are statistically significant. Whether the absence of such analysis is due to the lower court's inability to critically examine statistical evidence of considerable conceptual complexity is beside the point. Without at least a cursory probing of the significance of the data and the strength of the correlations between the relative racial mix of voting precincts and the votes cast for minority and majority-preferred candidates, a "right" of proportional representation comes closer to reality. When this right of proportionality is tied to the geographically based remedy of creating a majority-minority district, concern over the gradual racial "balkanization" of the electoral processes[105] should cause us to reconsider the section 2 evidentiary framework.

Several very recent decisions from the First, Fifth and Eleventh Circuits give the surest indication that the lower courts have begun to take up where the *Gingles* Court left off on the racial bloc voting inquiry, that is, whether proof of racial animus is necessary to establish "legally significant racial bloc voting" under the *Gingles* preconditions. The evolution of the racial bloc voting evidentiary standard which these decisions portend has been sparked by the continuing unease which the lower courts have experienced in resolving minority vote dilution claims under section 2 vis-a-vis the statutory prohibition against creating a right of proportional represen-

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[105] *See* Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 2832 (1993) (expressing concern that race-based districting "even for remedial purposes, may balkanize us into competing racial factions" and "threatens to carry us further from the goal of a political system in which race no longer matters"). Of course, the concern over the gradual "racial balkinaization" of the electoral process which promises to gradually continue as § 2 litigation proceeds refers to the reality that the geographically based remedies of creating majority-minority districts usually results in creating a single district comprising at least half of the minority electorate within a given jurisdiction, with the concomitant result of eliminating any appreciable minority "influence" in the remaining districts.

tation. The Fifth Circuit in *LULAC v. Clements*,[106] the Eleventh Circuit in *Nipper v. Smith*, [107] and the First Circuit in *Uno v. City of Holyoke*,[108] examined the legislative history of amended section 2 and carefully considered the "results" test of *Whitcomb* and *White*, ultimately deciding that proof of the causes of observed voting patterns is essential to a full and considered evaluation of a minority vote dilution claim.[109] These decisions stand collectively for the proposition that proof that the voting behavior of the white majority electorate was motivated by "race-neutral" reasons unrelated to the "minority-preferred" status of the candidates would prevent a finding of legally significant racial bloc voting.[110]

In *LULAC*, the Fifth Circuit, sitting en banc, considered a minority vote dilution claim against a single-member judicial districting scheme under amended section 2.[111] The Fifth Circuit reversed the lower court's finding of a violation of section 2 which was based, in part, on a finding that the plaintiffs needed only to "demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting."[112] Finding that the "rigorous protections" of the Voting Rights Act extended only to "defeats experienced by voters 'on account of race or color,'"[113] the

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[106] 999 F.2d 831 (5th Cir. 1993) (en banc), *cert. denied*, 114 S. Ct. 878 (1994).

[107] 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1795 (1995).

[108] 73 F.3d 973 (1st Cir. 1995).

[109] *See infra* notes 111-25 and accompanying text.

[110] *Id.*

[111] *LULAC*, 999 F.2d at 837. While the Supreme Court has ruled that the Voting Rights Act applies to both legislative and judicial elections, an argument can be made that because of the differences between legislative and judicial elections, courts should accommodate the interests of § 2 analysis to the unique characteristics of judicial elections. *See* Kirsten L. Izatt, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act*, 1966 U. ILL. L. REV. 229, 260-69.

[112] *LULAC*, 999 F.2d at 850. The district court excluded evidence which was probative of whether the "divergent voting patterns were attributable to race-neutral factors, finding that this evidence was "irrelevant and "legally incompetent." *Id.*

[113] *Id.*

LULAC court rejected the lower court's construction of the racial bloc voting inquiry stating:

> Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense 'discriminatory,' and any distinction between deprivation and their losses at the polls becomes untenable. In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the District Court unloosed Section 2 from its racial tether and fused illegal vote dilution and political defeat.[114]

The Fifth Circuit carefully examined the legislative history behind amended section 2 and found it most significant that the Senate Report accompanying the 1982 amendments specifically codified the "results" test delineated in *Whitcomb* and *White*. The Fifth Circuit noted that in keeping with *Whitcomb*, the Senate Report equated racial bloc voting with proof that race is the predominant determinate of political preference.[115] Turning its attention to the facts before it, the court sharply criticized the plaintiffs' failure to introduce any evidence that "race . . . is the predominate determinate of political preference."[116] Examining the results test of *Whitcomb* and *White*, the court observed that the results test applied by the Supreme Court in both decisions clearly required the plaintiffs to prove that the voting differences between the majority and minority electorate were due to racial animus in the electorate and not due to other race-neutral factors.[117]

Having decided that evidence of the reasons behind majority electorate behavior was indeed "relevant" to the racial bloc voting inquiry,[118] the *LULAC* Court then explored two alternative evidentiary models by which such evidence could be

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[114] *Id.*
[115] *LULAC*, 999 F.2d at 854-55.
[116] *Id.* at 855.
[117] *Id.* at 851-53.
[118] *Id. at 850.*

introduced into the racial bloc voting calculus. Under the first method, a section 2 plaintiff would be required to affirmatively prove that the losses experienced by minority-preferred candidates were the result of racial animus within the white electorate.[119] Without such proof, plaintiffs could not sustain their burden of proof on this *Gingles* precondition.[120] Proof of racial animus as the cause of minority candidate defeat would logically require the use of multivariate regression statistics,[121] detailed voter surveys, expert political/historical research into past and present election campaigns and extensive use of anecdotal evidence in order to identify racial animus as the real culprit behind candidate losses to the exclusion of other causes deemed "race-neutral."[122]

LULAC went on to consider a second "kinder-gentler" form of proof which would instead require plaintiffs to "negate" only "partisan politics" as the cause of preferred candidate defeat in order to meet the burden of proof on the racial bloc voting inquiry.[123]

The Fifth Circuit stopped short of deciding which of the two models would be the most appropriate evidentiary framework to the racial bloc voting inquiry.[124] In the end, it was unnecessary to resolve whether plaintiffs bore an affirmative burden to demonstrate that the losses experienced by the minority group's candidates were due to racial animus because the evidence showed "unmistakably" that the divergent voting patterns between majority and minority voters were best explained by "partisan" affiliation, much like that considered in the *Whitcomb* decision.[125]

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[119] *Id. at 859-60.*

[120] *LULAC*, 999 F.2d at 859.

[121] *See infra* notes 154-63 and accompanying text.

[122] *LULAC*, 999 F.2d at 859.

[123] *Id.* at 859-60. The less restrictive nature of this test of legally significant racial bloc voting, according to *LULAC*, parallels the *Whitcomb* and *White* approach to impermissible vote dilution. Yet it carries with it the considerable drawback of leaving open the possibility that other race-neutral factors were influencing electoral outcomes and thus would likely be over inclusive in application.

[124] *Id.* at 859.

[125] *Id.* at 861. The *LULAC* plaintiffs were challenging the state's electoral sys-

Prompted by *LULAC*, the Eleventh Circuit in *Nipper v. Smith*[126] concurred that Congress, in amending section 2, intended a distinction between losses caused by racial bias and those resulting from ordinary politics.[127] In *Nipper*, the Eleventh Circuit reached what has been characterized as a "somewhat broader conclusion"[128] to the effect that "Section 2 plaintiffs must demonstrate, through the [*Gingles*] test objective factors taken as a whole, that a voting community is driven by racial bias and that the challenged electoral scheme allows that bias to dilute the minority population's voting strength."[129] While *LULAC* was factually limited to distinctions between elections influenced primarily by partisan politics, as opposed to racial bias, and therefore did not decide the issue,[130] the Eleventh Circuit in *Nipper* found that any relevant non-racial causes could be raised to explain losses by minority-preferred candidates.[131] However, unlike *LULAC*, consideration of the causes of majority electorate behavior was not tied into the bloc voting inquiry but, rather, was tied into the "totality of the circumstances" analysis.[132]

The First Circuit in *UNO v. City of Holyoke*[133] agreed with the premise of *LULAC* and *Nipper* that plaintiffs could not prevail on a vote dilution claim under section 2 where there was "significantly probative evidence" that the white majority

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tem regarding a judicial election that had garnered very little public attention. In fact, most voters were not at all familiar with the race of the candidates for whom they voted. Therefore, it was clear voters had voted for judges according to their parties since the ballots informed the voters to which party the candidate belonged.

[126] 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1795 (1995).

[127] *Nipper*, 39 F.3d at 1522.

[128] *See* Reed v. Town of Babylon, 914 F. Supp. 843, 877 (E.D.N.Y. 1996) (holding that "losses by minority-preferred candidates attributable to partisan voting rather than racial bias would not constitute legally significant bloc voting under the third *Gingles* prong").

[129] *Nipper*, 39 F.3d at 1524-25.

[130] *LULAC*, 999 F.2d at 861.

[131] *Nipper*, 39 F.3d at 1524.

[132] *Id.*

[133] 72 F.3d 973 (1st Cir. 1995).

electorate voted as a bloc for reasons "wholly unrelated to racial animus."[134] As in *LULAC* and *Nipper*, the First Circuit relied primarily on the language of section 2 itself, the legislative history set forth in the accompanying Senate Report, and the contours of the "results" test of *Whitcomb* and *White* in finding that a consideration of the "causes" of electorate voting patterns was essential to a full and fair consideration of a minority vote dilution claim.[135]

Under the First Circuit view, the second and third *Gingles* preconditions are designed to "assay whether racial cleavages in voting patterns exist and, if so, whether those cleavages are deep enough to defeat minority-preferred candidates time and again."[136] Should the plaintiff succeed in proving the existence of "minority political cohesion" and "racial bloc voting" (through proof limited to the divergent nature of minority and majority voting patterns), the First Circuit held that an "inference" is created "that racial bias is operating through the medium of the targeted electoral structure to impair minority political opportunities."[137] The inference of racial animus created by proof of the second and third *Gingles* preconditions, according to the *UNO* court, "will endure unless and until the defendant adduces credible evidence tending to prove that detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system."[138] Finally, the *UNO* Court held that "once the defendant proffers enough evidence to raise a legitimate question in regard to

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[134] *Uno*, 72 F.3d at 981. In reaching its conclusion, the court stated that "[t]he upshot is that when racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics." *Id.*

[135] *Id.* at 981-82. The court rejected the plaintiff's interpretation of the amended version of § 2, holding that the language of amended § 2 does not "foreclose any inquiry whatever into the reasons why minority groups lack opportunities for electoral participation." *Id.* at 952.

[136] *Id.* at 953.

[137] *Uno*, 72 F.3d at 953.

[138] *Id.* In describing the defendant's burden of proof to rebut the inference created by the plaintiff's satisfaction of the three *Gingles* preconditions, the court stated that "it is only when such evidence possesses convictive force that the inference of racial animus will be called into serious question." *Id.*

whether non-racial factors adequately explain racial voting patterns," plaintiffs retain the ultimate burden of proving that the voting patterns are the result of racial animus.[139]

Following the lead of *LULAC*, *Nipper* and *UNO*, the district courts have begun to give attention to the need to delve into the reasons underlying perceived voting patterns by either acknowledging its "relevance" to the racial bloc voting inquiry[140] or by acknowledging the overriding importance of tying the losses experienced by the minority-preferred candidates to a white majority voting bloc motivated by racial animus.[141]

A. Overview of the Vote Dilution Case

"[T]he allocation of proof in section 2 cases must reflect the essential purpose of the Voting Rights Act in its intended liberality as well as the practical difficulties of proof in the real world of trial."[142] When presenting proof in a vote dilution case, the proponent should focus his evidence in such a manner that the "past and present reality" that existed and does exist in the challenged electoral system is understandable to the trier of fact. Just as the proper analysis under the totality of the circumstances test seeks to illuminate "a 'functional' view of the political process,"[143] so the proof at trial must be tailored in such a way as to illustrate what actually takes place in the polity that has bearing on the opportunities afforded the

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[139] *Id.*

[140] *See, e.g.*, Sanchez v. Colorado, 861 F. Supp. 1516, 1527 (D.Colo. 1994) (considering multivariate statistical analysis which explained causes underlying voter behavior).

[141] Reed v. Town of Babylon, 914 F. Supp. 843, 877 (E.D.N.Y. 1996) (stating that losses attributable to partisanship voting rather than racial bias would not constitute legally significant bloc voting); Armstrong v. Allain, 863 F. Supp. 1320, 1330 (S.D. Miss. 1994) ("for white bloc voting to be considered 'legally significant,' it must be shown that 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate,' but . . . even where this is shown, such bloc voting is still not 'legally significant' unless race is shown to be the reason for the bloc voting").

[142] *LULAC*, 999 F.3d at 860.

[143] *Reed*, 914 F. Supp. at 865 (quoting S. Rep. at 30, 1982 U.S.C.C.A.N. at 208).

minority members of the electorate to participate in the political process and to elect their preferred candidates for public office. As reaffirmed by the Supreme Court in *Johnson v. De Grandy*,[144] the elements of an actionable section 2 vote dilution claim consist of the three *Gingles* preconditions and a totality of the circumstances approach to the jurisdiction and electoral scheme at issue which together seek to answer the question of whether the minority group enjoys equal access to the political process.[145] Obviously, satisfaction of the first two *Gingles* preconditions does not depend upon proof of racial animus or the reasons underlying the adoption of electoral structures or the voter behavior at issue. For example, minority cohesion, when measured by the propensity of the minority electorate to vote together for a particular candidate, is not concerned with "why" minority voters vote together, only "whether" they tend to vote together.[146] However, if one were to give principled effect to the language of section 2, as amended, its legislative history, and the *White* and *Whitcomb* results test incorporated into the text of amended section 2, one should require proof that the losses experienced by minority-preferred candidates (as the principal indicator of the degree of access) is actually due to the fact that the candidate is preferred by the minority and not other legitimate race-neutral factors.

For this reason, the racial bloc voting inquiry has recently evolved in the direction of requiring an inquiry into the reasons

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[144] __ U.S. ____, 114 S. Ct. 2647 (1994).

[145] *De Grandy*, 114 S. Ct. at 2657. The Court construed *Gingles* to hold that the three preconditions were not in themselves sufficient to sustain a vote dilution claim: "if *Gingles* so clearly identified the three as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination, either in the sense that a court's examination of relevant evidence was complete once the three factors were found to exist, or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *Id.* A searching examination of the totality of circumstances was necessitated in the Court's view "because bloc voting was a matter of degree, with a variable legal significance depending on other facts, but also because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.* (citations omitted).

[146] *Gingles*, 478 U.S. at 2792; *see also supra* note 76.

underlying white bloc voting. The Fifth Circuit, in *LULAC,* while finding that evidence which links racial bias within the white electorate to the losses suffered by minority-preferred candidates was essential to the racial bloc voting inquiry, left undecided the question of whether the plaintiff must prove the existence of racial animus as explanatory of minority candidate defeat.[147] It did decide that, at the very least, a plaintiff must negate partisan politics as the cause of defeat in order to satisfy the third *Gingles* precondition.[148] In *Nipper*, the Eleventh Circuit, like the First Circuit in *UNO*, did not impose an affirmative initial burden on the plaintiffs to disprove the existence of race-neutral reasons underlying the defeat of its preferred candidates in order to satisfy the racial bloc voting inquiry.[149] This evidence was nonetheless considered relevant to the ultimate issue of access.[150] A more detailed review of the three methods by which the causes of majority electorate behavior may be introduced into the vote dilution analysis as suggested by the *LULAC*, *Nipper* and *UNO* decisions is provided below.

B. Three Models of Proof

1. Proof Of Racial Animus As Essential To Legally Significant Racial Bloc Voting

Under the first evidentiary model presented in *LULAC*, a plaintiff must prove that the losses suffered by minority-preferred candidates were due to racial animus in the majority electorate in order to sustain their burden of proof on the racial bloc voting inquiry.[151] Under this model, plaintiff's evidence would consist of either statistical estimates or direct evidence of factors which conceivably drive majority electorate behavior as proof that racial animus was more likely than not the cause of the minority-preferred candidates' usual loss at the polls. The failure to introduce evidence of racial animus in support of

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[147] *LULAC*, 999 F.2d at 859.
[148] *Id.* at 861.
[149] *Nipper*, 39 F.3d at 1524.
[150] *Id.*
[151] *LULAC*, 999 F. 3d at 859-60.

the racial bloc voting inquiry would necessarily result in a finding in favor of the defendant because of plaintiff's inability to establish one of the "necessary" *Gingles* preconditions.[152] This approach to legally significant racial bloc voting has been followed in one recent district court decision and resulted in the dismissal of the section 2 claim.[153]

As mentioned earlier, this evidentiary standard would obviously necessitate a shifting from the now-favored use of bivariate statistical techniques (which only measure "how" voters vote along racial lines) to the use of multivariate statistical techniques (which would presumably examine the "causes" of voter behavior), political-historical analysis of past and present electoral campaigns and anecdotal evidence to establish the requisite link between minority candidate losses and majority invidious behavior. Obviously, the nature of the proof required under this model to prove legally significant racial bloc voting is more stringent than the traditional approach to this *Gingles* precondition which relied on the existence of divergent voting patterns coinciding with the usual loss of minority-preferred candidates to prove this inquiry.[154] Because the only variables utilized in the bivariate regression analysis are race of the candidate and ethnicity of electoral precincts, other factors bearing upon the electoral support of a particular candidate within a particular community will not be identified through that analysis. While at least one commentator has suggested that a statistical approach to identify other factors at work in a given election is "inappropriate,"[155] many courts find multiple regression analysis (as one form of multivariate statistical tech-

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[152] *De Grandy*, 114 S. Ct. at 2657.

[153] Armstrong v. Allain, 893 F. Supp. 1320, 1330 (S.D. Miss. 1994) (holding that "for white bloc voting to be considered 'legally significant' it must be shown that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate but, . . . even where this is shown, such bloc voting is still not 'legally significant' unless race is shown to be the reason for that bloc voting. . . .") (quoting *LULAC*, 999 F.2d at 850).

[154] *LULAC*, 999 F.2d at 860.

[155] *See* Bernard Grofman, *Criteria for Redistricting*, 33 UCLA L. REV. 77, 141 n.272 (1985) (emphasizing that "multivariate analysis is not appropriate for the purpose of determining whether or not racially polarized voting exists").

nique)[156] more persuasive in determining whether racially polarized voting exists.[157] Past criticisms leveled at the use of multivariate statistical evidence had more to do with a philosophical disagreement over the relevance of "causal" evidence in section 2 litigation than the methodological shortcomings inherent in the technique.[158]

One author has recently observed that multiple regression analysis has grown steadily as an evidentiary tool in litigation.[159] The seeming reluctance of some courts to endorse the use of multiple regression analysis in vote dilution cases is hard to explain especially when one considers that this analysis is regularly used in a wide variety of litigation and is gaining in frequency. To be sure, the use and relevance of statistical methodology must be carefully weighed in any courtroom setting and this goes for bivariate and multivariate statistical techniques as well. Yet the supposed added costs and greater

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[156] Multivariate statistical techniques examine the effect of two or more independent variables (such as partisan affiliation, campaign spending, incumbency, etc.) on the dependent variable (number of votes cast for each candidate). Although the use of multivariate analysis is comparatively more expensive and time consuming than bivariate analysis, the rapidly increasing use of multivariate analysis in a variety of litigation should dispel concerns over its utility and the effect of such added costs on vote dilution claims. *See infra* note 159 and accompanying text.

[157] *See, e.g.*, McCord v. City of Fort Lauderdale, 787 F.2d 1528, 1532 (11th Cir. 1986) (accepting district court's rejection of bivariate analysis and application of multivariate analysis); Jones v. City of Lubbock, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., specially concurring) (stating that "multi-variate mathematical inquiry will often be *essential* to gauge the explanatory power of the variables necessarily present in a political race") (emphasis added).

[158] *See* Bernard Grofman, *Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts*, 72 SOC. SCI. Q. 826 (1991). For an opposing view on the utility of multivariate statistical techniques in voting rights cases, see David A. Freedman et al., *Ecological Regression and Voting Rights*, 15 EVAL. REV. 673 (1991).

[159] *See* Daniel L. Rubenfield, *Reference Guide on Multiple Regression*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 415, 420 n.5 (noting that "[t]here were only 2 WESTLAW references to multiple regression in federal cases between 1960 and 1960, 26 references between 1970 and 1979, 204 references between 1980 and 1989, and 73 references since 1990"). Rubenfield goes on to point out that while multiple regression analysis is used most frequently in race and sex discrimination cases and litigation involving antitrust claims, it has been offered as evidence in voting rights cases as well. Rubenfield, *supra*, at 420. n.6, 7, 9.

complexity of multivariate (as opposed to "bivariate") statistical analysis should not preclude its use or minimize its utility in vote dilution cases. Certainly, there is no principled basis for rejecting multiple regression analysis which offers the very type of probing into the causes of voter behavior which recent case law requires.[160]

2. Negating Partisan Politics As The Cause of Minority Candidate Defeat

The second model of proof discussed in *LULAC* involved the more deferential standard of requiring plaintiffs simply to negate partisan politics rather than affirmatively proving racial animus as the most likely cause of minority candidate defeat.[161] Justification for an admittedly less stringent standard of proof as to the legally significant racial bloc voting inquiry lies in the fact that it is precisely that—less stringent—and therefore would not present as formidable a barrier to vote dilution claims as the first model. Relegating plaintiff's proof to negating partisan politics is also justified on the grounds that it is similar to the analysis in *Whitcomb* and *White* and avoids the significant problem of ferreting out apparent race-neutral causes which, in reality, serve as "proxies" for racially motivated behavior.

The problem with the "partisan politics" approach is that it focuses on only one of many potentially race-neutral causes of voter behavior and therefore offers the very real possibility that a section 2 violation would be found in circumstances where minority candidate losses did not occur "on account of race." It is assumed, however, that the defendant would be permitted to introduce other race-neutral evidence to explain minority candidate defeats within the totality of the circumstances inquiry.

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[160] Any criticism over the methodological shortcomings of multivariate techniques really goes more to the "weight" of such evidence rather than to its "admissibility."

[161] *LULAC*, 999 F.2d at 859-60.

3. *The* UNO-Nipper *Model*

Under the *UNO-Nipper* model, in order to prevail on a vote dilution claim under section 2, the plaintiff must establish by a preponderance of the evidence[162] the *Gingles* preconditions, which constitute what may be termed the section 2 prima facie case. If these elements are shown to exist under the challenged electoral scheme, an "inference" is raised that minority members in the political unit in question have been harmed by the interaction between social and historical conditions existing therein and the challenged electoral practice, procedure, or structure. The resulting inference of harm, however, is rebuttable through proof that the losses suffered by minority-preferred candidates were due to race-neutral reasons.[163] Like the model of proof allocation in a typical Title VII case,[164] the *Gingles* preconditions under *UNO* are designed to disclose impermissible racial animus where there is no direct evidence of intentional discrimination. Proof submitted on each precondition, will, to a lesser or greater degree of precision (this dependant upon the tools utilized) disclose the voting behavior of majority and minority groups in the community scrutinized. Similar to Title VII's focus on employment actions taken on the basis of race, the reason why certain patterns of voter behavior are evident in the community examined, like, for instance, white bloc voting, is the focus of the exercise.[165]

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[162] *Gingles*, 478 U.S. at 50.

[163] *Uno*, 72 F.3d at 980.

[164] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The prima facie case under Title VII likewise creates a mandatory rebuttable presumption that the action challenged was taken on the basis of race. A prima facie case for disparate treatment under Title VII is established by showing: (1) the plaintiff is a member of a minority; (2) the plaintiff was qualified for the position she held; (3) the plaintiff was discharged despite fulfilling normal job requirements; and (4) after plaintiffs discharge, her position was filled by a non-minority. *Id.* Once the plaintiff has made out her prima facie case, the defendant may rebut the presumption by articulating a legitimate non-discriminatory basis or reason for the discharge. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The plaintiff at all times retains the burden of demonstrating "a discriminatory reason . . . motivated the employer or . . . that the employer's preferred explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

[165] In this vein, it matters not that the "results" test of White v. Regester, 412

Under this model, the plaintiff retains the ultimate burden of proving that the minority group is denied meaningful access to the political system "on account of race." Accordingly, the defendant's burden is that of production. Once the plaintiff offers proof on the three preconditions necessary to make out a section 2 prima facie case (compactness\cohesiveness\white bloc voting), the defendant will respond in rebuttal with evidence refuting the inference that racial bias in the community interplays with the challenged structure or practice resulting in the usual defeat of minority-preferred candidates. It is of some significance that the section 2 defendant under *Uno* need not affirmatively offer anything in rebuttal as the plaintiff does not automatically prevail after satisfying the *Gingles* factors. Proof of the lack of racial bias in the community is not necessarily an affirmative defense. Rather, the defendant may always elicit proof through cross-examination that bloc voting or some other precondition, while satisfied quantitatively, in the sense that enough proof has been offered on the particular factor to meet the *Gingles* criterion, qualitatively fails to raise an inference that racial bias is operating through the system to deny minority voters equal access to the political process.

Once the defendant proffers sufficient evidence either in rebuttal or through cross-examination "to raise a legitimate question with regard to whether non-racial factors adequately explain racial voting patterns," the plaintiff must still persuade the fact finder that the voting patterns presented are in fact caused by racial considerations.[166] Thus, whether defendant chooses to affirmatively offer explanatory proof in rebuttal, or alternatively, challenge the predictive quality of the plaintiffs' proof via cross-examination and offer nothing in rebuttal, the plaintiff retains the burden of persuasion that political opportunity is limited and a remedy exists.

There is an obvious inconsistency between *De Grandy*'s

U.S. 755 (1973) has taken the place of the "intent" test set out by the Mobile v. Bolden, 446 U.S. 55, 74 (1980), because the focus of the Voting Rights Act has never been altered.

[166] *See Uno*, 72 F.3d at 973.

emphasis on a searching evaluation of the "totality of the circumstances,"[167] and the *Uno-Nipper* model of proof.[168] Under *Uno-Nipper*, a section 2 plaintiff would prevail based simply on an "unrebutted" prima facie case consisting of the three *Gingles* preconditions.[169] The error in this approach to a vote dilution claim lies in the fact that it shortchanges an inquiry into the totality of the circumstances mandated by *De Grandy*.[170] Under *De Grandy*, the *Gingles* preconditions are necessary but not sufficient to substantiate a vote dilution claim precisely because bloc voting by the majority electorate is always a matter of degree with a corresponding "variable legal significance depending on other facts," and because Congress intended that the ultimate legal conclusion regarding equality or inequality of minority opportunity be based on a "comprehensive, not limited, canvasing of relevant facts."[171] Under the *Uno-Nipper* model, the preconditions *are* sufficient and are, in fact, elevated to "presumptive" standing within the vote dilution calculus. Absent a defendant's introduction of countervailing proof consisting of "race-neutral" explanations for the "usual" defeat of minority-preferred candidates, plaintiff prevails.[172]

Aside from its obvious conflict with *De Grandy*, the *Uno-Nipper* model—fashioned after the burden shifting evidentiary scheme employed in Title VII cases—is inappropriate to the section 2 context. The presumption of race-based decision making resulting from the *McDonnell Douglas* prima facie case (and as refined in *Texas Department Community Affairs v. Burdine*[173]) was devised to "reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof."[174] Thus in claims of employment discrimination

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[167] *De Grandy*, 114 S. Ct. at 2657.

[168] *See supra* notes 162-65 and accompanying text.

[169] *See Nipper*, 39 F.3d at 1525-26; *Uno*, 72 F.3d at 983.

[170] *De Grandy*, 114 S. Ct. at 2657.

[171] *Id.*

[172] See *Uno*, 72 F.3d at 983.

[173] 450 U.S. 248 (1981).

[174] International Bro. of Teamsters v. United States, 431 U.S. 324, 361 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluation of probabilities and to conform with a party's superior access

governed by Title VII and the *McDonnell Douglas—Burdine* evidentiary framework, the Supreme Court has found it appropriate to establish a presumption based upon proof of the prima facie case (consisting of proof that plaintiff was qualified and the defendant/employer inexplicably delayed its employment decision in favor of an other race applicant) both because of the probability that, in the face of the prima facie case, the defendant's behavior was likely motivated by discriminatory animus and as a practical concession to the defendant's superior access to the proof surrounding its employment decision.[175] The *McDonnell Douglas* presumption is also justified by the reality that two of the more typical race-neutral justifications, that is, the minority applicant was not qualified and the lack of an available position, are eliminated by the prima facie case.[176]

The *Gingles* preconditions, on the other hand, do not lend themselves to an inference of discrimination. A presumption of "racial animus" based on the *Gingles* preconditions is far more problematical because the behavior one is attempting to label as invidious usually takes place over years or decades and typically involves dozens of unique election contests. The problem is compounded by the inherent shortcomings of the bivariate statistical techniques traditionally employed to estimate voter behavior by race. These techniques only measure "how" voters vote—not "why" they vote.[177] Further, the layers of "assumptions" underlying these techniques and the varying degrees of significance and correlations yielded by such techniques[178] do not translate into the sort of straightforward proof which typically dictates presumptions in the law. Moreover, unlike the defendant/employer in a Title VII case, a government entity in a section 2 case is not in a "superior" position regarding proof of the factors motivating majority electorate

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to the proof."); *see also Burdine*, 450 U.S. at 256 n.10.

[175] *Burdine*, 450 U.S. at 255.

[176] *Id.*

[177] *See supra* note 83.

[178] *Id.*

behavior. Finally, because the ultimate issue in a section 2 vote dilution claim is not "discriminatory animus" but rather equality or inequality of minority access, satisfaction of the *Gingles* preconditions is plainly inadequate to create a presumption on the ultimate issue.

Although *Uno-Nipper* rightly acknowledged the importance of evidence pertaining to the reasons underlying majority bloc voting behavior, the first model of proof described in *LULAC* is the only model which is consistent with Supreme Court precedent and the language of amended section 2. An insistence on proof that losses suffered by minority-preferred candidates are "on account of race" beyond proof that majority and minority groups tend to vote differently offers the only assurance that amended section 2, as applied, does not confer a right of proportional representation.

IV. Conclusion

The courts are beginning to require that section 2 plaintiffs tie the lack of minority electorial success to race-based animus in the community or structure challenged. Stated another way, plaintiffs cannot prevail on a section 2 claim if there is probative evidence that white voters voted as a bloc for reasons wholly unrelated to racial animus.[179] Where proof is adduced that the minority-preferred candidate's defeat at the polls is caused by the candidate's lack of focus or money or any one of numerous reasons not associated with race, section 2 of the Voting Rights Act is not infringed.[180] Many opportunities exist to challenge the quality of the proof presented by plaintiffs concerning the correlations between voting patterns and minority participation in the electorial process. Now that most courts that have recently examined the issue have concluded that the "why" regarding voter behavior is as important as the "how" of voter participation, the likelihood that plaintiffs will

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[179] *Uno*, 72 F.3d at 981.

[180] *Id.* at 986 ("causal connection between the challenged practice . . . and the diluted voting power of the minority must be established") (quoting Whitfield v. Democratic Party of State of Arkansas, 890 F.2d 1423, 1430 (8th Cir. 1989)).

prevail on a section 2 claim with proof restricted to the *Gingles* preconditions is diminishing. The inference that minorities have been denied access to the political process simply because there are observable disparities in minority participation (as measured by minority candidate success) under the challenged electoral scheme or structure is no longer the nearly irrefutable presumption it once was. Rather, courts have now come to the realization that the section 2 plaintiff's burden remains to show that the community is driven by racial animus and the electoral scheme allows that animus to dilute the minority populations voting power.[181]

[181] *See Nipper*, 39 F.3d at 1525.

COMMENTS

POLITICAL AND RACIAL GERRYMANDERING: A PROPOSAL FOR COMPARABLE CAUSES OF ACTION

I. INTRODUCTION

Gerrymandering is the process by which lawmakers, when reapportioning voting districts, manipulate district boundaries and place certain voters in certain districts to secure a desired result in elections.[1] This comment deals with two types of gerrymandering, political and racial, both of which the United States Supreme Court has found in certain circumstances to be in violation of the Equal Protection Clause of the U.S. Constitution.[2] The requirements for a threshold showing of political gerrymandering, however, are very different from those for a claim of racial gerrymandering.

Section I of this comment will discuss the background of political gerrymandering jurisprudence and the current cause

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[1] Jon M. Anderson, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after* Davis v. Bandemer, 136 U. PA. L. REV. 183, 183 (1987). The term "gerrymander" was coined 183 years ago in reference to a Massachusetts state senatorial reapportionment scheme which contained a salamander-shaped voting district drawn to benefit the political party of Governor Elbridge Gerry. *Id.*

[2] U.S. CONST. amend. XIV, § 1.

of action as established in the case of *Davis v. Bandemer*.[3] Next, section II will discuss the background of racial gerrymandering and the current cause of action as set forth in last year's decision in *Miller v. Johnson*.[4] Finally, Section III will argue that the two causes of action should be comparable, and that the standard for a racial gerrymandering claim should be raised to require the same elements as those of a political gerrymandering claim.

II. Political Gerrymandering

A. Background

For many years the United States Supreme Court, consistent with its opinion in the 1946 case of *Colegrove v. Green*[5], viewed issues of political gerrymandering as nonjusticiable. In that case the Court held that reapportionment issues were nonjusticiable political questions, stating that "the appellants ask of this Court what is beyond its competence to grant."[6] Exhorting lower courts not to enter into the "political thicket" of redistricting law,[7] the Court described the issue of reapportionment "to be of a peculiarly political nature and therefore not meet for judicial determination."[8]

The Court's attitude had changed, however, by the time of its 1962 decision in *Baker v. Carr*,[9] where the Court held that reapportionment questions were issues which the judiciary was competent to decide.[10] Responding to the argument that

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[3] 478 U.S. 109 (1986).

[4] 63 U.S.L.W. 4726 (1995).

[5] 328 U.S. 549 (1946).

[6] *Colegrove*, 328 U.S. at 552. The plaintiffs, a group of Illinois voters, sought to enjoin an election because subsequent population changes, the Illinois districts for the election of Representatives to Congress, as drawn in 1901, "lacked compactness of territory and approximate equality of population." *Id.* at 550-51.

[7] *Id.* at 556. The Court was concerned with trampling on the power of congress. *Id.*

[8] *Id.* at 552. The Court stated that the remedy for poorly drawn electoral districts was to elect legislatures that would draw the districts fairly. *Id.* at 556.

[9] 369 U.S. 186 (1962).

[10] *Baker*, 369 U.S. at 237. The plaintiffs alleged that due to the "debasement" of their votes by means of a 1901 Tennessee statute apportioning the members of

no judicially manageable standards for determining apportionment issues existed, the Court explained that "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."[11]

Having opened the door for judicial involvement in the reapportionment process, the Court articulated its first guideline for determining such issues in *Reynolds v. Sims*,[12] which established the "one person, one vote" standard.[13] The Court held that the Equal Protection Clause of the Fourteenth Amendment requires legislative bodies to be apportioned into equipopulous voting districts, since "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[14]

However, in applying this principle of population equality among voting districts, the Court avoided the more difficult issues raised by political gerrymandering. The Court failed to discuss the constitutionality of voting districts which, although equipopulous, were drawn by state legislatures for political purposes.[15] In fact, in a series of summary dispositions, the

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the General Assembly among the state's 95 counties, the plaintiffs and other voters were denied the equal protection of the laws accorded them by the Fourteenth Amendment to the U.S. Constitution. *Id.* at 187-88.

[11] *Id.* at 226. The Court remanded the case for further proceedings consistent with its opinion. *Id.* at 237.

[12] 377 U.S. 533 (1964).

[13] *Reynolds*, 377 U.S. at 558. The plaintiffs, a group of voters from Jefferson County, Alabama, claimed that due both to the fact that Alabama's legislative districts had not been redrawn since 1900 and to subsequent population changes, the plaintiffs were underrepresented in the state legislature. *Id.* at 540. Therefore, the plaintiffs claimed, they were denied equal participation in free and equal elections in violation of the Alabama Constitution and the Fourteenth Amendment to the U.S. Constitution. *Id.*

[14] *Id.* at 568. The Court's holding did not require precise mathematical equality among a state's voting districts, but rather mandated that states "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id.* at 577.

[15] Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political*

Court refused to consider whether political gerrymandering was justiciable.[16] It was not until its decision in *Gaffney v. Cummings*[17] that the Court gave its first indication that it might consider the issue of political gerrymandering to be justiciable.

In *Gaffney*, the Court upheld a Connecticut reapportionment plan, drawn by representatives from both political parties, which adhered to a policy of "political fairness," whereby the relative strength of both parties was reflected in the locating and defining of voting districts.[18] While stating that the plan was not invidiously discriminatory,[19] the Court pointed out that voting districts, although equal or substantially equal in population, may nonetheless be "vulnerable" under the Fourteenth Amendment.[20] Such would be the case, the Court went on, when the districting plan is "employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'"[21] However, the Court did not artic-

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Gerrymandering and the Supreme Court, 43 EMORY L.J. 1519, 1523-24 (1994). One man, one vote is not the only issue. *Id.* at 1524. Legislatures must create structures that actually serve the community sentiment. *Id.*

[16] *See* Jimenez v. Hidalgo County Water Improvement Dist. No. 2, 424 U.S. 950, 950 (1976), *aff'g* 68 F.R.D. 668, 674-75 (S.D. Tex. 1975) (refusing, inter alia, to expand constitutional protection from vote dilution to include political gerrymandering absent racial discrimination); Ferrel v. Hall, 406 U.S. 939, 939 (1972), *aff'g* Ferrel v. Oklahoma ex rel. Hall, 339 F. Supp. 73, 82 (W.D. Okla. 1972) (holding that political gerrymandering in single-member districting is nonjusticiable); Wells v. Rockefeller, 398 U.S. 901, 901 (1970), *aff'g* 311 F. Supp. 48, 51-53 (S.D.N.Y. 1970) (holding that political gerrymandering which complies with "one person, one vote" standard is nonjusticiable).

[17] 412 U.S. 735 (1973).

[18] *Gaffney*, 412 U.S. at 738, 753-54. The plan was drawn in light of the party voting results in the three previous statewide elections, and reflected what was thought to be a proportionate number of legislative seats for each political party. *Id.* at 738. The complaint alleged both that the plan did not sufficiently comply with the principle of "one person, one vote," and that it amounted to a political gerrymander biased in favor of the Republican Party. *Id.* at 738-39.

[19] *Id.* at 751. The plan's average deviation from the ideal House district was only about 2 percent, and the average deviation among Senate districts was even less. *Id.*

[20] *Gaffney*, 412 U.S. at 751. Voting districts could be redrawn so as to deprive a racial group of their municipal vote or cancel the voting power of certain racial or political groups. *Id.*

[21] *Id.* (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965), *cert. denied*, 379

ulate the factors which would cause a politically discriminatory redistricting plan to be found violative of the Equal Protection Clause. In fact, the Court pointed out that "[p]olitics and political considerations are inseparable from districting and apportionment," and that "districting inevitably has and is intended to have substantial political consequences."[22] Therefore, the Court's decision left potential plaintiffs with neither precedent nor guidelines under which to bring equal protection claims of political gerrymandering.

The Court came still closer to recognizing political gerrymandering as a valid basis for an equal protection claim in the case of *Karcher v. Dagget*.[23] In *Karcher*, the Court struck down a New Jersey reapportionment statute because the plan was not a good faith effort to achieve population equality among voting districts.[24] In his concurring opinion, Justice Stevens agreed that the plan was an unconstitutional product of political gerrymandering.[25] He asserted that the Equal Protection Clause proscribed political gerrymandering that causes "vote dilution."[26] To make out a claim of political gerrymandering, Justice Stevens explained, plaintiffs must both demonstrate their membership in an identifiable political

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U.S. 998 (1965)).

[22] *Id.* at 753. The Court flatly rejected the suggestion that legislators ignore political data in an attempt to achieve population equality without regard for political impact. *Id.* Such an approach, the Court warned, may inadvertently produce "the most grossly gerrymandered results." *Id.*

[23] 462 U.S. 725 (1983)., *aff'd*, 467 U.S. 1222 (1984).

[24] *Karcher*, 462 U.S. at 744. Although the plan's districts differed from the ideal district by an average of only 0.1384%, the Court held that the plan's drafters had not used the best available census data, and that the state's justification for the population deviations was not supported by the evidence. *Id.* at 728, 744.

[25] *Id.* at 744-65 (Stevens, J., concurring).

[26] *Id.* at 744 (Stevens, J., concurring). He argued:

> There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well.

Id. at 749 (citations omitted) (Stevens, J., concurring).

group whose voting power has been weakened, and "make a prima facie showing that raises a rebuttable presumption of discrimination."[27] Also, Justice White recognized in his dissent that mandatory compliance with the "one person, one vote" standard alone is insufficient to prevent deliberate partisan gerrymandering.[28] It would not be until its decision in *Davis v. Bandemer*,[29] that the Court would recognize political gerrymandering as the basis for a distinct equal protection cause of action.

B. Davis v. Bandemer

The *Davis* decision concerned an equal protection challenge to a 1981 Indiana reapportionment statute.[30] At the time the plan was drawn, the Republican Party enjoyed majorities both in the House and in the Senate, and the Governor was Republican.[31] The reapportionment plan for the Senate was composed of fifty single-member districts, while the House plan contained a combination of single-member and multi-member districts.[32] Under both plans, Democratic voters were "stacked" into districts where they had an overwhelming ma-

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[27] *Karcher*, 462 U.S. at 754-55 (Stevens, J., concurring). Justice Stevens argued that although a political group may establish a dilution of its voting strength by relying on the "one person, one vote" standard, prima facie evidence of political gerrymandering may be presented in other ways as well. *Id.* at 755 (Stevens, J., concurring). He stated that other evidence of political vote dilution may be the shape of the district's configuration, divergences from mathematical standards of compactness, deviations from established political boundaries, and decisionmaking procedures which disallowed differing viewpoints and openly demonstrated the use of biased criteria. *Id.* at 755-59 (Stevens, J., concurring).

[28] *Id.* at 776 (White, J., dissenting).

[29] 478 U.S. 109 (1986).

[30] *Davis*, 478 U.S. at 113. The Indiana Legislature reapportioned the State's legislative voting districts in 1981 pursuant to the 1980 census. *Id.* at 113.

[31] *Id.* at 113-14. The House consisted of 100 members who served two-year terms, with elections every two years for all seats. *Id.* at 113. The Senate consisted of 50 members who served four-year terms, with elections for half of the seats every two years. *Id.*

[32] *Davis*, 478 U.S. at 114. The House plan was composed of 61 single-member, nine double-member, and seven triple-member districts. *Id.* The population deviation among House districts was 1.05%, and the deviation among Senate districts was 1.15%. *Id.*

jority, thereby diluting Democratic populations in other districts.[33] As a result, Democrats received a majority of the statewide popular vote in the 1982 elections, but the Republicans retained a majority of the legislative seats.[34]

Shortly before the 1982 elections were held, several Indiana Democrats filed suit in district court claiming that the 1981 reapportionment proposal embodied a political gerrymander designed to violate the Democrats' Fourteenth Amendment rights.[35] In 1984 the United States District Court for the Southern District of Indiana held for the plaintiffs, declaring the reapportionment statute to be unconstitutional.[36] The defendants appealed to the United States Supreme Court.[37] In a plurality opinion written by Justice White, the Supreme Court reversed the district court's ruling, holding that although the issue of political gerrymandering was indeed justiciable, the plaintiffs had failed to show an equal protection violation.[38]

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[33] *Id.* at 180.

[34] *Id.* at 115. In the House, where all of the seats were up for election, Democratic candidates received 51.9% of the popular vote, but won only 43 out of 100 seats. *Davis*, 478 U.S. at 115. In two of the most metropolitan counties, both of which were divided into multi-member House districts, Democrats received 46.6% of the vote, but won only three out of the 21 seats. *Id.* In the Senate, where half of the seats were up for election, Democrats received 53.1% of the vote, and won a comparable 13 out of 25 seats. *Id.* However, when the other half of the Senate seats were up for election in 1984, Democrats received 42.3% of the vote, but won only seven seats. *Id.* at 182-83.

[35] *Id.* at 115.

[36] *Davis*, 478 U.S. at 115. The district court enjoined the defendants from holding further elections pursuant to the 1981 plan and ordered the Indiana General Assembly to create a new plan. *Id.*

[37] *Id.* at 118. The appellants assigned as error the district court's rulings (1) that the issue of the case was justiciable and (2) that, if justiciable, there had been an equal protection violation. *Id.*

[38] *Id.* at 143. Two Justices joined Justice O'Connor in a concurring opinion which urged that the issue of political gerrymandering is a nonjusticiable political question. *Davis*, 478 U.S. at 144 (O'Connor, J., concurring). Justice Powell, joined by Justice Stevens, concurred as to the Court's ruling on the justiciability of political gerrymandering. *Id.* at 161 (Powell, J., concurring in part and dissenting in part). However, he dissented as to the Court's decision that no equal protection violation had been shown. *Id.* at 162 (Powell, J., concurring in part and dissenting in part).

In its opinion, the Court first addressed the question of whether a claim of political gerrymandering presents a justiciable controversy.[39] Applying its *Baker* analysis, the Court determined that disposition of a political gerrymandering issue did not involve the Court in issues better determined by a coequal branch of the federal government, that there was "no risk of foreign or domestic disturbance," and that there were judicially manageable standards by which such cases may be decided.[40] In the political gerrymandering context, the Court explained, "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group."[41] Declining to hold that such representational issues were never justiciable, the Court concluded that political gerrymandering questions are within its competence to determine.[42]

The Court then turned to the question of whether the *Bandemer* plaintiffs had proven a violation of the Equal Protection Clause.[43] In this discussion, the Court first set out the threshold requirements for such a claim—that the plaintiffs prove both (1) deliberate discrimination against a known political organization, and (2) an actual prejudicial repercussion on that organization.[44] As to the first requirement, the Court echoed its *Gaffney* reasoning that politics is an inherent consideration in the redistricting process.[45] Aside from evidence

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[39] *Id.* at 118. The Court rejected the appellants' contention that consideration of the issue was precluded by the Court's prior summary dispositions affirming lower court decisions which found political gerrymandering claims to be nonjusticiable. *Id.* at 121.

[40] *Id.* at 123.

[41] *Davis*, 478 U.S. at 124. The Court stated that representation was the main issue, and they refused to say that these claims were never justifiable. *Id.*

[42] *Id.* at 124. "As *Gaffney* demonstrates, that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Id.* at 125.

[43] *Id.* at 127.

[44] *Id.*

[45] *Davis*, 478 U.S. at 128 (citing Gaffney v. Cummings, 412 U.S. 735, 752 (1973)). The Court thought it likely that whenever a legislature redistricts, those who draft the scheme are aware of the likely political composition of the new districts, and will be able to anticipate whether a given district is a safe one for a particular political party, or instead is a competitive district which might be won

of the shape of the districts and the alleged disregard for political boundaries, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[46] Accordingly, the Court agreed with the district court's finding that any discrimination effected by the Indiana statute was intentional.[47] It was with the district court's conclusion that the plaintiffs had sufficiently proven an adverse effect, however, that the Court took exception.[48]

In describing the adverse effect requirement of political gerrymandering claims, the Court engaged in an extensive discussion of the principle that a lack of proportional representation alone will not suffice to prove unconstitutional discrimination.[49] "Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[50] In the political gerrymandering context, the Court went on, this would be the case only where there is evidence either of the "continued frustration" of the determination of a majority of the voters, or of the denial to a minority of voters of the opportunity to influence the political process.[51] The Court concluded, therefore, that the district court's reliance on the results of only a single election was insufficient as a basis for finding discriminatory effect.[52]

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by either candidate. *Id.* at 128.

[46] *Id.* at 128-29. Political considerations cannot be separated from redistricting and reapportionment. *Id.* at 128.

[47] *Id.* at 127.

[48] *Davis*, 478 U.S. at 129.

[49] *Id.* at 131.

[50] *Id.* at 132. The Court explained that "the power to influence the political process is not limited to winning elections." *Id.* Those who vote for losing candidates, the Court stated, are usually deemed to be adequately represented by the winning candidate, and thus have as much opportunity to influence the political process as do other voters in the district. *Id.* The Court will not presume, absent actual evidence to the contrary, that successful candidates will entirely ignore the interests of losing voters. *Id.* "This is true even in a safe district where the losing group loses election after election." *Davis*, 478 U.S. at 132.

[51] *Id.* at 133.

[52] *Id.* at 135. The Court pointed out, for example, that the district court did

Justice Powell concurred in part and dissented in part, agreeing with the plurality's assertion of the two threshold requirements for a political gerrymandering claim, but arguing that the plurality's finding that a claim had not been sufficiently established essentially rested solely on the fact that the Indiana apportionment plan had complied with the "one person, one vote" standard.[53] The merits of a gerrymandering claim, he contended, should properly be determined by reference to other factors as well.[54] In the instant case, for example, the Court should have examined the legislative procedure by which the plan was accepted,[55] to the plan's adherence to traditional political subdivisions and principles of community interest,[56] and evidence that the plan's drafters were motivated entirely by partisan considerations.[57] Justice Powell be-

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not find that the Indiana apportionment plan would prevent the Democrats from winning a majority of the legislative seats in one of the next few elections. *Id.* Also, there was no finding that the Democrats had no hope of faring any better with the reapportionment plan that would take place following the 1990 census. *Id.* at 135-36.

[53] *Davis*, 478 U.S. at 161, 162 (Powell, J., concurring in part and dissenting in part). The primary justification offered by the appellants was that the plan satisfied the "one person, one vote" requirement. *Id.* at 184 (Powell, J., concurring in part and dissenting in part).

[54] *Id.* at 161 (Powell, J., concurring in part and dissenting in part). He explained that a court should consider the legislature's consideration of traditional redistricting principles such as the configurations of the districts and the observance of political subdivision lines. *Id.* at 165 (Powell, J., concurring in part and dissenting in part).

[55] *Id.* at 175 (Powell, J., concurring in part and dissenting in part). Justice Powell noted the district court's findings that the apportionment scheme's drafting committee was composed entirely of Republicans, that the plan was made known to Democrats only two days before the close of the General Assembly's regular meeting, and that the plan was adopted on the last day of the assembly by party line vote in both houses. *Id.* at 175, 176 (Powell, J., concurring in part and dissenting in part).

[56] *Davis*, 478 U.S. at 176 (Powell, J., concurring in part and dissenting in part). The mapmakers carved dissected counties, cities, and townships, with many districts meandering through a number of counties, picking up several townships from each. *Id.* In one instance, the seat of one county was placed in a district composed of townships from other counties. *Id.* at 176-77 (Powell, J., concurring in part and dissenting in part).

[57] *Id.* at 177 (Powell, J., concurring in part and dissenting in part). Republican leaders openly expressed their goal of disadvantaging Democratic voters, with one Republican House member declaring, "[T]he name of the game is to keep us

lieved that by putting on evidence as to these matters, the plaintiffs had met the threshold showing required of equal protection claims of political gerrymandering.[58] The plurality rejected Powell's argument, however, by explaining that factors other than disproportionate election results contribute only to a finding of discriminatory intent, but not to a finding of discriminatory effect, without which there can be no claim.[59]

Despite reversing the district court's ruling in favor of the plaintiffs, the Court's decision in *Davis* was of tremendous importance in that it established the justiciability of political gerrymandering even in the absence of a violation of the "one person, one vote" standard.[60] Also, it set out the threshold showing required in order to make out an equal protection claim of political gerrymandering. As this comment will discuss, however, this threshold showing differs significantly from that required of equal protection claims of racial gerrymandering.

III. Racial Gerrymandering

A. Background

The United States Supreme Court's first foray into the area of racial gerrymandering came in its decision in *Gomillion v. Lightfoot*.[61] The Court rejected the *Colegrove v. Green* principle of the nonjusticiability of reapportionment matters,[62] holding instead that plaintiffs belonging to a racial minority are entitled to pursue claims that a state has unconstitutionally discriminated against them through the use of a reapportionment scheme which deprives the plaintiffs of their right to vote.[63] The Court explained that where a state has

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in power." *Id.* at 177-78 (Powell, J., concurring in part and dissenting in part).

[58] *Davis*, 478 U.S. at 174 (Powell, J., concurring in part and dissenting in part).

[59] *Id.* at 140.

[60] Hamilton, *supra* note 15, at 1535.

[61] 364 U.S. 339 (1960).

[62] *Gomillion*, 364 U.S. at 346.

[63] *Id.* at 348. The *Gomillion* plaintiffs challenged on Fifteenth Amendment

differentiated among voters on racial lines so as to withdraw votes solely from a racial minority, such circumstances "lift this controversy out of the so-called 'political' arena and into the conventional sphere of constitutional litigation."[64]

Congress reacted to similar concerns by passing the Voting Rights Act of 1965,[65] which was designed to ensure minority access to the ballot.[66] Despite this statutory protection of their constitutional right to vote, minorities still faced many obstacles to participation in the political process.[67] Perhaps the most effective of these obstacles was the use by majority legislators of invidious racial gerrymandering, by which minority voters were effectively denied the opportunity to exercise the political power that should have accompanied the protection of their right to vote.[68] Consequently, there was a shift in voting rights litigation from the issue of individual voting rights to that of minority vote dilution through racial gerrymandering.[69]

In *Whitcomb v. Chavis*,[70] the Court rejected the plaintiffs' vote dilution claim on the grounds that there was no allegation that the challenged districting scheme was purposefully designed to promote racial or economic discrimination.[71] A

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grounds a 1957 Alabama statute which redefined the boundaries of the City of Tuskegee. *Id.* at 340. The challenged statute altered the shape of Tuskegee from a square to a twenty-eight-sided figure which, although retaining all of its white residents, removed virtually all of its black voters from within the city limits, thereby depriving the black voters of the right to vote in municipal elections. *Id.* at 341.

[64] *Id.* at 346-47.

[65] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

[66] Section 2 of the Act prohibited the use of electoral procedures which infringed on the right to vote on the basis of race or color; § 4 ordered the suspension of tests or devices used for voter registration in any state where less than half of the population was registered to vote; and § 5 required covered states to get preclearance from either the U.S. Attorney General or the U.S. District Court for the District of Columbia before implementing any voting prerequisite, qualification, standard, practice or procedure. 42 U.S.C.A. §§ 1973, 1973b, 1973c (1994).

[67] Hamilton, *supra* note 15, at 1527.

[68] Hamilton, *supra* note 15, at 1527.

[69] Hamilton, *supra* note 15, at 1527.

[70] 403 U.S. 124 (1971).

[71] *Whitcomb*, 403 U.S. at 149. The plaintiffs, a group of minority Indiana

mere lack of proportional representation, the Court held, was insufficient to prove invidious discrimination.[72] Rather, evidence was required that plaintiffs had less opportunity than did other voters in their district "to participate in the political processes and to elect legislators of their choice."[73] Relying on this standard again in *White v. Regester*,[74] the Court affirmed the invalidation of a Texas reapportionment plan, basing its decision on "the totality of the circumstances."[75] Examining the history of official racial discrimination in the state, the Court found that the plaintiffs' racial and ethnic minority groups had been for many years both excluded from participation in the election process and denied influence at the legislative level,[76] a condition which the Court concluded was a clear violation of the *Whitcomb* equal protection standard.[77]

The Court applied a stricter standard, however, in the

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voters residing primarily in a ghetto area of Marion County, challenged on equal protection grounds the state's districting scheme for general assembly elections. *Id.* at 127. The plaintiffs claimed that by districting Marion County as a multi-member district, the plan accorded plaintiffs almost no political influence over legislators since plaintiffs' votes were cancelled out by other interest groups within the district. *Id.* at 129. Evidence showed that the ghetto area, while having 17.8% of the county's population, was the residence of only 4.75% of the county's state senators, and only 5.97% of the county's representatives. *Id.* at 133. The plaintiffs sought to have Marion County broken down into single-member districts. *Id.* at 129.

[72] *Id.* at 149.

[73] *Id.*

[74] 412 U.S. 755 (1973).

[75] *White*, 412 U.S. at 769. *White* was a consolidated action in which groups of black and Mexican-American voters sought the disestablishment of multi-member legislative districts in two Texas counties. *Id.* at 756. The plaintiffs claimed that the House redistricting plan was unconstitutional due to extreme variations in population from district to district, and that the multi-member districts for Bexar and Dallas counties constituted invidious discrimination against racial and ethnic groups in those counties. *Id.* The Court rejected the plaintiffs' claim as to the plan's alleged violation of the "one man, one vote" standard, but held in favor of the plaintiffs as to the invidious discrimination of the two multi-member districts. *Id.* at 763, 765.

[76] *Id.* at 767. The Court found not only that minority candidates in the two districts had been only very rarely elected to the legislature, but also that the majority candidates that had been elected had remained largely unresponsive to the concerns of the minority community. *White*, 412 U.S. at 767.

[77] *Id.* at 769.

case of *City of Mobile v. Bolden*.[78] In that case, rejecting an equal protection challenge to Mobile's at-large method of electing commissioners,[79] the Court held that "only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."[80] The Court implicitly rejected the *Whitcomb* "totality of the circumstances" test, asserting instead that past discrimination is insufficient to sustain an equal protection claim absent a showing of discriminatory intent.[81]

Faced with the near impossibility of such proof absent the "smoking gun,"[82] Congress in 1982 amended section 2 of the Voting Rights Act[83] to eliminate the requirement of proof of discriminatory intent, creating a more results-oriented test for minority vote dilution.[84] Addressing the amendments in *Thornburg v. Gingles*,[85] the Supreme Court set out a three-part test for minority vote dilution.[86] To make out a claim,

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[78] 446 U.S. 55 (1980).

[79] *Bolden*, 446 U.S. at 80. The case, a class action suit brought on behalf of all of Mobile's black citizens, charged that Mobile's history of electing city commissioners at-large unfairly diluted the voting strength of blacks in violation of § 2 of the Voting Rights Act of 1965, of the Fourteenth Amendment, and of the Fifteenth Amendment. *Id.* at 58. The Court described § 2 of the Voting Rights Act as simply restating the prohibitions already set forth in the Fifteenth Amendment, and thus discussed only the merits of the Fourteenth and Fifteenth Amendment claims. *Id.* at 62. Finding that Mobile's black citizens had encountered no obstacles to their ability to register and vote, the Court rejected the Fifteenth Amendment claim. *Id.* at 65.

[80] *Id.* at 66.

[81] *Bolden*, 446 U.S. at 73. The Court stated that "[e]vidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices. . . . The ultimate question remains whether a discriminatory intent has been proved in a given case." *Id.* at 74 (footnote omitted).

[82] Anderson, *supra* note 1, at 197.

[83] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (codified at 42 U.S.C.A. § 1973 (1994)).

[84] Section 2 of the Voting Rights Act now includes a "totality of the circumstances" test almost identical to that first set out in *Whitcomb*. *See* 42 U.S.C.A. § 1973 (1994).

[85] 478 U.S. 30 (1986).

[86] *See Thornburg*, 478 U.S. at 50. In *Thornburg* the Court upheld, except as to one House district, a challenge to a North Carolina apportionment scheme as abridging the rights of black voters in violation of § 2 of the Voting Rights Act of

plaintiffs must show: (1) that the minority group is sufficiently large and geographically compact to create a majority-minority single-member district; (2) that the minority community is politically cohesive; and (3) that the white majority votes as a bloc, enabling it usually to defeat the minority's preferred candidate.[87]

This new standard as set forth in the Voting Rights Act and clarified by the Court in *Thornburg* led to a drive on the part of minority vote dilution litigants to achieve electoral success at the polls, the preferred means to which was the creation of majority-minority single-member districts through the use of benign racial gerrymandering.[88] At this point, despite having had the opportunity, the Supreme Court had never struck down a single-member reapportionment scheme on the basis of racial gerrymandering.[89] The tensions created by the exaggerated gerrymandering in which legislatures were forced to engage in order to create majority-minority districts, however, came to a head in the Court's decision in *Shaw v. Reno*.[90]

In *Shaw*, a group of white voters challenged on equal protection grounds a North Carolina redistricting plan which created two bizarrely-shaped, majority-black voting districts.[91] The plaintiffs, who did not identify themselves in the complaint as being white, claimed that the deliberate segregation of voters on the basis of race violated their constitutional

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1965, and of the Fourteenth and Fifteenth Amendments. *Id.* at 80.

[87] *Id.* at 50-51.

[88] Hamilton, *supra* note 15, at 1530-31.

[89] Anderson, *supra* note 1, at 196 (citing United Jewish Org.'s v. Carey, 430 U.S. 144, 167-68 (1977) (denying claim by Hasidic Jews whose community in New York was split between two senate districts and two assembly districts); Wright v. Rockefeller, 376 U.S. 52, 58 (1964) (denying claim that New York apportionment plan had segregated voters in Manhattan congressional districts on basis of race).

[90] 113 S. Ct. 2816 (1993).

[91] *Shaw*, 113 S. Ct. at 2817-18. The North Carolina Legislature, in order to satisfy the preclearance demands of the U.S. Attorney General, had extensively gerrymandered district lines in order to provide for two majority-minority districts. *Id.* at 2820-21. The shapes of the two districts were very irregular, with one district being approximately 160 miles long, often no wider than the corridor of Interstate 85. *Id.* at 2818.

right to participate in a 'color-blind' electoral process.[92] By a five-four majority, the Supreme Court upheld the claim, holding that to make out an equal protection claim of racial gerrymandering, plaintiffs need only show that the challenged plan is "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification."[93] Such would be the case, the Court explained, where a state has created a majority-minority district based solely on race, without any regard for traditional districting principles such as compactness, contiguity, and respect for political subdivisions.[94] The Court would modify this new equal protection cause of action, however, in its decision in *Miller v. Johnson*.[95]

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[92] *Id.* at 2821.

[93] *Id.* at 2828. Recognizing that this newly articulated racial gerrymandering claim required a much lower threshold showing than did a claim for political gerrymandering, the Court explained:

> [N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race, would seem to compel the opposite conclusion.

Shaw, 113 S. Ct. at 2828 (citation omitted).

[94] *Id.* at 2826. The Court reasoned that racial gerrymandering injures voters in ways other than merely diluting a racial group's voting strength. *Id.* at 2827. Majority-minority districting based solely on race, the Court complained, reinforces undesirable racial stereotypes that members of the same racial group all think alike, share the same interests, and will prefer the same candidates at the polls. *Id.* at 2827-28. The Court also argued that such districting "threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Id.* at 2828.

Justice White, joined by Justices Blackmun and Stevens, dissented from the majority opinion on the grounds that the plaintiffs had alleged no legally cognizable injury. *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

[95] 115 S. Ct. 2475 (1995).

B. Miller v. Johnson

In *Miller*, the Court dealt with an equal protection challenge to a 1991 Georgia statute reapportioning the state's congressional districts.[96] In order to satisfy the preclearance demands of the U.S. Attorney General, the Georgia General Assembly drafted a plan which provided for three majority-minority voting districts.[97] One of the districts, the Eleventh District, connected "the black neighborhoods of metropolitan Atlanta [with] the poor black populace of coastal Chatham County" 260 miles away in order to secure a black majority.[98] Elections were held under the new plan in 1992, and black candidates were elected from each of the majority-black districts.[99]

Early in 1994, a group of five white voters from the Eleventh District filed suit in district court challenging the constitutionality of that district.[100] Relying on the U.S. Supreme Court's holding in *Shaw* they alleged that the Eleventh District constituted a racial gerrymander in violation of the Fourteenth Amendment.[101] The United States District Court for the Southern District of Georgia held for the plaintiffs, declaring the district to be unconstitutional under the Equal Protection Clause,[102] from which judgment the defendants appealed

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[96] *Miller*, 115 S. Ct. at 2485. The Georgia General Assembly had redrawn the state's congressional districts pursuant to the 1990 census, which indicated that Georgia's black population was entitled to an additional eleventh congressional seat. *Id.* at 2483.

[97] *Id.* at 2484. The General Assembly had twice previously presented redistricting plans for preclearance, but both plans had been rejected by the Attorney General on the grounds that they each contained only two majority-minority districts. *Id.* at 2483-84.

[98] *Id.* at 2484. The Eleventh District was described as a geographic "monstrosity" whose core was the "lightly populated, but heavily black" plantation country in the center of the state, and which linked "by narrow corridors" the black communities in Augusta, Savannah and southern DeKalb County. *Miller*, 115 S. Ct. at 2484 (quoting M. BARONE & G. UJIFUSA, ALMANAC OF AMERICAN POLITICS 356 (1994)).

[99] *Id.* at 2485.

[100] *Id.*

[101] *Id.* at 2485.

[102] *Id.* The district court found that the Eleventh District was drawn with race

to the United States Supreme Court.[103] The Supreme Court affirmed the district court's decision by a five-four majority and remanded the case for further proceedings.[104]

In its opinion delivered by Justice Kennedy, the Court examined at length its holding in *Shaw*, from which the Court concluded that plaintiffs alleging unconstitutional racial gerrymandering may rely on evidence other than a district's bizarre shape.[105] The plaintiff's burden in such cases, the Court asserted, is to show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[106] The Court stated that to make this showing, a plaintiff must prove that the legislature considered race above traditional race-neutral districting principles such as compactness, contiguity, and respect for political subdivisions or communities of shared interest.[107] In accordance with this statement of the plaintiff's burden, the Court discussed evidence of the Georgia Assembly's subordination of traditional districting principles to racial considerations when creating the Eleventh District,[108] and held that the plaintiffs had made a threshold

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as "the overriding and predominant force" in the districting process, thus running afoul of the district court's interpretation of the racial gerrymandering standard established in *Shaw*. *Miller*, 115 S. Ct. at 2485. Furthermore, the court found that the apportionment scheme did not stand up to the strict scrutiny standard of being narrowly tailored to further a compelling governmental interest. *Id.*

[103] *Id.*

[104] *Id.* at 2494.

[105] *Id.* at 2486. The Court explained that a district's shape is relevant not because bizarreness is a threshold requirement of proof in racial gerrymandering claims, but because "it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 115 S. Ct. at 2486.

[106] *Id.* at 2487.

[107] *Id.* A state can defeat a racial gerrymandering claim by showing that these race-neutral considerations were not subordinated to race as the basis for the challenged reapportionment scheme. *Id.*

[108] *Id.* at 2489. The Court noted the Georgia Attorney General's objection to the Justice Department's preclearance demands on the grounds that in order to provide for three majority-minority districts, the state would have to contravene all reasonable standards of compactness and contiguity. *Miller*, 115 S. Ct. at 2489-90. The Court also pointed out that there were no tangible communities of interest within the Eleventh District, but rather there was a wide divergence of

showing of unconstitutional race-based districting.[109]

Justice Stevens dissented, reasoning that neither in *Shaw* nor in *Miller* did the plaintiffs allege a legally cognizable injury, and thus they lacked standing to sue.[110] He questioned the validity of the 'representational harms' which the *Shaw* Court contended were occasioned by the deliberate creation of majority-minority districts.[111] The "'representational harms'" feared by the *Shaw* Court were that officials elected from districts drawn on the basis of race would likely feel beholden only to members of that particular racial group, rather than to the constituency as a whole.[112] Justice Stevens pointed out, however, that such harm can come about only if all or most black voters support the same candidate.[113] In other words, he explained, the plaintiffs' standing to sue depended on the very principle that the Court denounced in *Shaw* as an unwanted racial stereotype—that voters of the same race all "think alike, share the same political interests, and will prefer the same candidates at the polls."[114] Justice Stevens urged, therefore, that unless racial gerrymandering plaintiffs allege a dilution of their voting strength, there is no conceivable injury with which they can support their claim.[115]

By affirming the district court's ruling in favor of the plaintiffs, the Court's decision in *Miller v. Johnson* lowered the threshold requirements set out in *Shaw v. Reno* for an equal protection claim of racial gerrymandering. Now, rather

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political, social and economic interests. *Id.* at 2490.

[109] *Id.* As this paper deals only with the threshold showings required of equal protection claims based on political and racial gerrymandering, there will be no discussion herein of the Supreme Court's strict scrutiny determination of whether Georgia's apportionment plan was narrowly tailored to serve a compelling governmental interest.

[110] *Id.* at 2497 (Stevens, J., dissenting). Justice Stevens was troubled by the Court's elimination in *Shaw* of the previous requirement that plaintiffs alleging racial gerrymandering demonstrate an injury to an identifiable group of voters. *Id.* (Stevens, J., dissenting).

[111] *Miller*, 115 S. Ct. at 2497 (Stevens, J., dissenting).

[112] *Id.* (Stevens, J., dissenting) (citing *Shaw*, 113 S. Ct. at 2827).

[113] *Id.* at 2497 (Stevens, J., dissenting).

[114] *Id.* at 2497-98 (Stevens, J., dissenting) (citing *Shaw*, 113 S. Ct. at 2827).

[115] *Id.* at 2497-98 (Stevens, J., dissenting).

than being required to show that the challenged apportionment scheme was based *solely* on race, plaintiffs need prove only that race was the legislature's *predominant* consideration. For better or for worse, this holding will likely lead to an increase in the number of claims brought by white plaintiffs challenging the constitutionality of majority-minority districting schemes.

IV. Proposal for Comparable Causes of Action

As they stand today, the equal protection causes of action for political and racial gerrymandering are very different. Whereas a claim of political gerrymandering requires a showing both of discriminatory intent and of an adverse effect,[116] a claim of racial gerrymandering requires only a showing of discriminatory intent.[117] In political gerrymandering claims, evidence of a legislature's consideration of traditional districting principles is relatively unimportant since it goes only to show discriminatory intent,[118] which can easily be proved without such evidence.[119] In racial gerrymandering claims, on the other hand, evidence of a legislature's lack of consideration of those very factors will alone constitute a threshold showing of unconstitutional discrimination.[120]

Thus, there are in our jurisprudence today two widely divergent gerrymandering causes of action, which seem to this observer to be inappropriate since both claims arise under the same constitutional principle of equal protection. In his concurring opinion in *Karcher v. Dagget*,[121] Justice Stevens wrote:

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[116] Davis v. Bandemer, 478 U.S. 109, 127 (1986) (plurality opinion). The *Davis* Court noted further, that in the context of political gerrymander claims, discriminatory effects may be established "only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole. *Id.* at 132.

[117] *See* Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (requiring racial gerrymander plaintiffs to show only that race was motivating factor behind apportionment scheme).

[118] *Davis*, 478 U.S. at 140 (plurality opinion).

[119] *See supra* notes 45, 46 and accompanying text.

[120] *Miller*, 115 S. Ct. at 2488.

[121] 462 U.S. 725 (1983).

> There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well.[122]

As the Fourteenth Amendment purports to protect all American citizens from any sort of unequal treatment under the laws of states,[123] I propose that the disparity between the two gerrymandering claims be lessened by raising the standard for racial gerrymandering claims to include, as does the standard for political gerrymandering, a threshold requirement of a showing of an adverse effect.[124]

The reason for raising the racial gerrymandering standard, as opposed to lowering the political gerrymandering standard, is twofold. First, raising the standard for racial gerrymandering claims comports with the legitimate legislative goal of achieving more proportional representation. Second, the appropriate analysis applied to gerrymandering claims has become one of group rights, an analysis in which courts can properly engage only with reference to an alleged adverse effect.

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[122] *Karcher*, 462 U.S. at 749 (Stevens, J., concurring) (arguing for justiciability of issue of political gerrymandering) (citations omitted); *see also* City of Mobile v. Bolden, 446 U.S. 55, 88 (1980) (Stevens, J., concurring) (asserting that "racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders").

[123] U.S. CONST. amend. XIV, § 1.

[124] Another proposal has been to take the ability to gerrymander out of the hands of state legislators by allowing them to consider only neutral factors when reapportioning voting districts, and to declare gerrymandering of any variety unconstitutional per se. *See* Hamilton, *supra* note 15, at 1558, 1564. The Supreme Court has cautioned, however, that such an approach could inadvertently produce "the most grossly gerrymandered results." Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

It is important to note that my proposal would not offend the well-established principle that racial classifications demand a stricter constitutional scrutiny than do other types of classifications. This change would affect only the *threshold* requirements of a racial gerrymandering claim, and would have no impact on the constitutional scrutiny applied after a prima facie showing of racial discrimination has been made.

A. Proportional Representation

The U.S. Supreme Court has made it clear time and again that proportional representation, by which an identifiable group of voters is represented by a number of legislators which is proportional to the group's population, is not mandated by the Constitution.[125] However, the Court has indicated just as strongly that state legislatures are free, through districting, to pursue policies of proportional representation. In *Gaffney v. Cummings*,[126] the Court stated:

> [N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.[127]

Clearly, proportional representation is a constitutionally permissible goal of legislative reapportionment.

However, as the creation of majority-minority districts is perhaps the primary means by which state legislators seek to provide for proportional representation, the Court's holdings in *Shaw* and *Miller* seriously challenge states' rights to pursue proportional representation among racial groups. By requiring racial gerrymander plaintiffs to show only race-based districting—but no adverse effect—in order to challenge the constitutionality of redistricting schemes, the Court has made it virtually impossible for states to defend plans whose goal is the proportional representation of racial minorities.[128] In or-

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[125] *See, e.g., Davis*, 478 U.S. at 130 (1986) (plurality opinion); White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 153 (1971); *see also* James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 536-37, 542-43 (1995) (analyzing *Davis*, *Regester*, and *Chavis* in context of vote dilution principle).

[126] 412 U.S. 735 (1973).

[127] *Gaffney*, 412 U.S. at 754 (upholding Connecticut apportionment statute as based on valid policy of "political fairness," whereby political parties would be represented in legislature in proportion to their voting strength statewide).

[128] Although the Supreme Court in *Miller* discussed Georgia's reapportionment

der to protect states' rights to pursue this plainly legitimate goal, therefore, the Court should raise the standard for such claims to require a showing of an adverse effect as well.

B. Group Rights Analysis

In his *Shaw* dissent, Justice White set out the two types of voting rights the violation of which might give rise to constitutional claims.[129] Those two types of rights are (1) individual voting rights, and (2) group voting rights.[130] The first type involves the individual right to vote, a right which clearly is not implicated by equal protection claims of racial gerrymandering.[131] The second type involves the political strength of various groups,[132] and is implicated in racial gerrymandering challenges by reference to whether a particular group has been afforded the opportunity "to participate in the political processes and to elect legislators of their choice."[133] This question does not arise, however, where plaintiffs are required only to show a discriminatory intent behind the challenged districting scheme. Therefore, in accordance with the group rights analysis demanded of racial gerrymandering claims, plaintiffs bringing such claims should be required to demonstrate an adverse impact on their group's voting strength.

V. CONCLUSION

The equal protection cause of action for political gerrymandering and that for racial gerrymandering, as set forth in *Davis v. Bandemer* and *Miller v. Johnson*, respectively, are extremely different with regard to their requirements for a threshold

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scheme only as an attempt to comply with the Justice Department's preclearance demands, the district court ruled that proportional representation did not constitute a compelling governmental interest. *Miller*, 115 S. Ct. at 2485.

[129] *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting).

[130] *Id.* (White, J., dissenting).

[131] *Id.* (White, J., dissenting). The individual right to vote can be violated, for example, by the use of poll taxes or literacy tests. *Id.* (White, J., dissenting).

[132] *Id.* (White, J., dissenting).

[133] White v. Regester, 412 U.S. 755, 766 (1973) (citing Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971)).

showing. While political gerrymander plaintiffs must show both a discriminatory intent behind the challenged districting plan and an adverse impact on the plaintiffs' voting strength in order to make out a claim, racial gerrymander plaintiffs need only show discriminatory intent in that the primary basis for the scheme was the race of the voters. However, since the Equal Protection Clause purports to provide an equal level of protection to all persons regardless of the group to which they belong, whether political or racial, it would be more appropriate for the threshold requirements of the two causes of action to be more comparable. Accordingly, and in light both of the legitimacy of the goal of proportional representation and of the necessity of the application of a group rights analysis to such claims, the standard for racial gerrymandering claims should be raised to include a threshold requirement of proof of an adverse impact as well as a showing of discriminatory intent.

LeRoy D. Percy

THE IMPACT OF THE SUPREME COURT'S CRITICISM OF THE JUSTICE DEPARTMENT IN *MILLER V. JOHNSON*

I. INTRODUCTION

This comment will examine the recent United States Supreme Court decision of *Miller v. Johnson*[1] and its impact on voting rights jurisprudence. Specifically, this comment will analyze whether *Miller* impedes the function of section 5 of the Voting Rights Act[2] [hereinafter Act] in light of the Court's criticism of the Justice Department's interpretation of section 5 regarding preclearance decisions and section 5 covered jurisdictions' reliance upon those decisions. Part II outlines the operation of section 5, as well as the most recent amendment to the section, and the Justice Department's role in enforcing section 5. Part III analyzes the Supreme Court's decision in *Miller*, including the Court's criticism of the Justice Department. Part IV discusses the tension between Congress' approach to remedying voting rights discrimination and the Supreme Court's approach in *Miller*. Part V examines the impact of the Court's criticism of the Justice Department as reflected in recent case law. After examining the enactment and operation of section 5, the Justice Department's role in enforcing the section, and the Supreme Court's decision in *Miller*, this comment will discuss the impact of the Court's decision, including the trend toward ignoring or criticizing Justice Department preclearance decisions, the possible dilution of the Justice Department's discretion in granting preclearance, and the impact of *Miller* on section 5 covered

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[1] ___ U.S. ___, 115 S. Ct. 2475 (1995).

[2] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)). The Act was adopted in 1965 and has been amended several times, most recently in 1982. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982). Section 5 of the Act is now codified at 42 U.S.C. § 1973c (1994).

jurisdictions.

II. Section 5 of the Voting Rights Act

A. *The Adoption and Operation of Section 5*

Section 5 was originally enacted in 1965 when Congress passed the Voting Rights Act to further the goals of the Fifteenth Amendment.[3] Congress adopted the section to curtail attempts by states and other political subdivisions to alter voting qualifications and procedures.[4] Section 5 requires certain states and political subdivisions, which seek to administer voting qualifications or prerequisites, to obtain preclearance from the United States Department of Justice or the District Court for the District of Columbia.[5] The preclearance requirement pertains to states which Congress has identified as having traditionally erected discriminatory barriers to minority participation in the electoral process.[6] A

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[3] H.R. Rep. No. 439, 89th Cong., 1st Sess. 1 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439. In the House of Representatives report documenting the adoption of the Act, the Voting Rights Act was reported to have been designed essentially to enforce the 15th Amendment. *Id.* at 2437.

[4] *Id.* at 2439. In *South Carolina v. Katzenbach*, the Supreme Court stated that the goal of the Voting Rights Act is to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." 383 U.S. 301, 328 (1966). Section 5 was adopted to further this goal by helping eliminate voting discrimination through tests and other devices which were prevalent in many states prior to the adoption of the Act. H.R. Rep. No. 439 at 2, *reprinted in* 1965 U.S.C.C.A.N. at 2440. The House of Representatives report on the adoption of the Act includes a list of the various devices which many states had implemented in order to frustrate minority voting rights. *Id.* at 2443-47. These devices included requiring reading and/or writing tests, constitutional "understanding" tests, and the completing of application forms. *Id.* at 2443. Some devices also forced applicants to demonstrate an understanding of citizenship duties, and to satisfy "good moral character" requirements. *Id.*

[5] H.R. Rep. No. 439 at 3, *reprinted in* 1965 U.S.C.C.A.N. at 2442. Section 5 preclearance generally applies to "any changes affecting the electoral process, no matter how minor." Joaquin Avila, Section 5 of the Voting Rights Act: Judicial Interpretation, Its Significance for Localities 6 (1995). The liberal scope of the section may include political party changes which affect election procedures, enabling legislation, or any change in election procedures, including the procedure and the change. 28 C.F.R. §§ 51.7, 51.14, 51.15, 51.17 (1995).

[6] H.R. Rep. No. 439 at 2-3, *reprinted in* 1965 U.S.C.C.A.N. at 2441-44. In its

state or political subdivision may pursue preclearance through the administrative procedures established by the Justice Department, or by filing an action for a declaratory judgment in the District Court for the District of Columbia.[7] Thus, the effect of the availability of administrative preclearance under section 5 is that jurisdictions with a history of voting rights discrimination usually submit any proposed change in voting standards, practices, or procedures to the Attorney General.[8] If the Attorney General objects to the proposal, then the state or subdivision will not be allowed to enact the proposed change without obtaining a declaratory judgment stating that such "qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging" the rights guaranteed by the Fifteenth Amendment.[9]

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report, the House emphasized the discriminatory devices implemented in states with large minority populations, including Mississippi, South Carolina, Alabama, Virginia, Georgia, Louisiana, and Oklahoma. *Id.* Today, § 5 preclearance applies to the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, as well as other political subdivisions in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota. AVILA, *supra* note 5, at 1; *see also* 28 C.F.R. § 51 (1995) (providing complete list of political subdivisions covered by § 5).

[7] 42 U.S.C. § 1973c (1994). Generally, because of the cost and delay in seeking a declaratory judgment in the District Court for the District of Columbia, most jurisdictions submit proposed changes to the Attorney General for preclearance. Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 191 (1983). The declaratory judgment option remains available even if the jurisdiction's attempt at obtaining administrative preclearance is unsuccessful. *Id.*

[8] Motomura, *supra* note 7, at 191. Section 5 requires that the covered state or subdivision bear the burden of proving, by a preponderance of the evidence, that the proposed change in voting standards, practices, or procedures does not have a discriminatory effect or purpose. *Id.* at 190; *see, e.g.*, Rome v. United States, 446 U.S. 156, 183 n.18 (1980) (stating that under § 5, legislature "bears the burden of proving lack of discriminatory purpose and effect"); South Carolina v. Katzenbach, 383 U.S. 301, 334-35 (1966) (upholding constitutionality of burden of proof).

[9] 42 U.S.C. § 1973c (1994).

B. The 1982 Amendments

When Congress amended the Voting Rights Act in 1982, there was much discussion about whether the preclearance requirements of section 5 should be retained.[10] Overwhelmingly the House and Senate Judiciary Committee [hereinafter the Committee] reviewing the Act found a need for the continuance of section 5 coverage to protect the rights guaranteed under the Fourteenth and Fifteenth Amendments.[11] In making this determination, the Committee noted that although progress has been made toward equal opportunity in voting, racial and minority discrimination still affected the right to vote in states covered by section 5.[12] In fact, the Committee stated that "without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight with new schemes and devices."[13] Thus, Congress chose to retain the preclearance requirements of section 5.[14]

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[10] S. REP. NO. 417, 97th Cong., 2d Sess. 9-15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 186-92. The 1982 Senate report noted that each time Congress had reviewed the Act, an argument had been advanced that there was no longer a need for § 5. *Id.* at 186. However, the Senate report also noted that Congress had consistently rejected these argument, and voted to retain the section. *Id.*

[11] *Id.* at 186. The Senate report reveals that the Committee which researched § 5 preclearance found that almost every witness before the Committee expressed a desire for the retention of § 5. *Id.*

[12] S. REP. NO. 417 at 11, *reprinted in* 1982 U.S.C.C.A.N. at 187. The Committee found that voting rights discrimination based on race persisted throughout § 5 covered jurisdictions, and stated that "[c]ontinued progress toward equal opportunity in the electoral process [would] be halted if we abandon the Act's crucial safeguards." *Id.*

[13] *Id.*

[14] *Id.* at 186-87. Although the preclearance requirements of § 5 were extended, Congress chose not to establish a nationwide preclearance requirement, because the Committee believed that such a requirement would probably be neither constitutional nor practical. *Id.* at 192. In addition to extending the preclearance requirement in 1982, Congress also attempted to control preclearance by establishing a ten-year "bail-out" plan, under which a state or political subdivision may escape preclearance of voting changes after ten years of compliance with § 5. AVILA, *supra* note 5, at 18. In order to obtain exemption from § 5 preclearance, the state or subdivision must file an action in the District Court for the District of Columbia, demonstrate compliance with the Act for at least 10 years, and establish affirmative steps to attain equal opportunity in voting rights. *See* S. REP. NO. 417 at 43-63, *reprinted in* 1982 U.S.C.C.A.N. at 221-40, 247-54 (outlining

C. The Role of the Justice Department

The Justice Department plays a vital role in the administration of section 5's preclearance requirements because the department is vested with the authority to determine whether a proposed change in voting procedures may be implemented under the Act.[15] In the original enactment of section 5 in 1965, Congress acknowledged the necessity of subjecting states with a history of discriminatory voting rights practices to federal review.[16] Congress reached this conclusion after detailing the unsuccessful prior attempts by the Justice Department to eliminate discriminatory devices in several states through civil rights litigation.[17] Thus, Congress determined that in order to stop discrimination in voting, the devices implemented by states with a history of voting discrimination must be subject to review.[18] Accordingly, Congress selected

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"bail-out" procedure).

[15] *See supra* notes 5, 8-9 and accompanying text.

[16] H.R. REP. NO. 439 at 8, *reprinted in* 1965 U.S.C.C.A.N. at 2441-47. The House report traced the history of voting rights discrimination throughout the United States and noted that "our national achievements in [voting equality] have fallen far short of our expectations." *Id.* at 2439, 2441-47.

[17] *Id.* at 2443-44. The House report chronicles litigation under the 1957, 1960, and 1964 voting rights statutes, and also discusses the inefficiency of the pre-Act case-by-case approach, under which the Justice Department was unable to obtain judicial relief, despite the expenditure of thousands of man-hours. *Id.* Additionally, the House report noted the insignificant increase in minority voter registration under the prior voting rights statutes. *Id.* at 2441. In justifying the enactment of § 5, as well as the Voting Rights Act in general, Congress noted that although the nation had made some progress toward equal opportunity in voting through the Civil Rights Act of 1964, the movement toward that goal was "painfully slow, in part because of the intransigence of state and local officials." *Id.* at 2440-41; *see supra* note 12 and accompanying text.

[18] H. Rep. No. 439 at 9, *reprinted in* 1965 U.S.C.C.A.N. at 2446-47. The House report pointed out that the existence of a pattern or practice of discrimination via tests and devices in most states with large minority populations was prevalent and "the norm rather than the exception." *Id.* at 2445. In addition to the screening mechanisms of § 5, Congress chose to include other sections of the Act to hamper these discriminatory devices. *Id.* at 2458. Section 6 of the Act provided for prompt voter registration for all elections in states with a history of voting rights discrimination. Voting Rights Act of 1965, Pub. L. No. 89-110, § 79 Stat. 437, 439-40 (codified as amended at 42 U.S.C. § 1973d (1994)). *See also* Jeffrey D. McMillen, *The Effects of the Voting Rights Act: A Case Study*, 72

the Justice Department and the District Court for the District of Columbia to monitor these states' proposals for changes in voting practices.[19]

Between 1965 and 1982, the role of the Justice Department under section 5 was shaped by Congress and the Supreme Court.[20] The Justice Department was given authority to object to proposals for changes in voting practices of all jurisdictions within the covered states, even without proof of discriminatory intent.[21] Furthermore, during this time, the

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WASH. U. L.Q. 725, 730 (1994) (outlining application of and intent behind § 6). Further, § 4 bans the use of all tests and devices implemented to hinder minority voter registration. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. § 1973b (1994)); *see also* McMillen, *supra* at 730 (outlining implementation of § 4).

[19] H.R. REP. NO. 439 at H.R. Rep. No. 439 at 16, *reprinted in* 1965 U.S.C.C.A.N. at 2447-48. Congress turned to the Justice Department to enforce § 5 because, prior to the adoption of the Act, the agency had been appointed to enforce the Fifteenth Amendment. *Id.* at 2439. Apparently, Congress assured that the Justice Department's previous experience regarding enforcement of voting rights statutes would be of benefit. Under § 5, the Attorney General has 60 days to approve or object to a covered jurisdiction's proposed voting change. AVILA, *supra* note 5, at 8. If the Attorney General fails to object to the proposal within the 60 day period, the proposed change is automatically deemed approved. *Id.* In some circumstances, covered jurisdictions may receive an expedited decision on preclearance or an extension of the sixty day period to allow additional information to be provided. *Id.*

[20] Motomura, *supra* note 7, at 189-93. As of 1983, the Justice Department or the District Court for the District of Columbia had objected to over 800 proposed voting changes which were deemed to have discriminatory purposes or effects. *Id.* at 191.

[21] *See* Drew S. Days, III, *Section 5 and the Role of the Justice Department, in* CONTROVERSIES IN MINORITY VOTING 52, 54-55 (Bernard Grofman & Chandler Davidson, eds., 1992) (describing the Justice Department's enforcement of § 5). The Justice Department's authority to object to a proposal based upon discriminatory effect alone stems from the 1982 amendments to § 2 of the Voting Rights Act. 42 U.S.C. § 1973(b) (1994). Section 2, as amended, reads in pertinent part: "(b) A violation of subsection (a) . . . is established if . . . shown that the political processes leading to . . . election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . ." *Id.* The effect of the foregoing statute is to provide a § 2 violation whenever a challenged election procedure has, under the totality of the circumstances, the result or effect of discriminating against a racial or language minority. S. REP. NO. 417, 97th Cong., 2d Sess. 1, 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206.

Supreme Court held that decisions of the Attorney General acting in this capacity were not subject to judicial review.[22]

In formulating the 1982 amendments, Congress specifically addressed the role of the Justice Department under section 5 while justifying the continuing need for the preclearance requirement.[23] Citing numerous examples, Congress applauded the Justice Department's objections to many proposed changes in voting practices.[24] Congress noted that these proposed plans demonstrated the extent of the lingering problem of voting rights discrimination.[25] Congress further stated that the Justice Department was properly qualified to assess these types of proposals, as often the discriminatory practices which have not received preclearance are subtle and complicated.[26]

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[22] Morris v. Gressette, 432 U.S. 491, 504-05 (1977). In *Morris*, the Supreme Court had the opportunity to determine the scope of judicial review of the Attorney General's decisions under § 5. *Morris*, 432 U.S. at 493. In analyzing the issue, the Court turned to the Administrative Procedure Act, which stated that an agency decision will have judicial review unless a statute precludes such review or the "agency action is committed to agency discretion by law." *Id.* at 500-01 (quoting 5 U.S.C. § 701(a) (1994)). Accordingly, the Court looked to the congressional intent behind the enactment of the Voting Rights Act as well as the statutory language and legislative history. *Id.* at 503-04. The Court determined that the role of the Attorney General under § 5 could not be judicially reviewed because "nonreviewability [could] fairly be inferred" from the description of the role of the Justice Department under § 5. *Id.* at 501, 504-05.

[23] S. REP. NO. 417 at 10-12, *reprinted in* 1982 U.S.C.C.A.N. at 187-89.

[24] *Id.* The Senate report listed proposed changes which the Justice Department objected to from 1975 to 1980, including "annexations; the use of at-large elections, majority vote requirements, or numbered posts; and the redistricting of boundary lines." *Id.* The report chronicled objections to specific proposals which the Justice Department found to have discriminatory effects and purposes. *Id.* Those proposals which did not receive preclearance included a proposed renewal of districts in Holly Springs, Mississippi which drastically impaired minority voting strength and a Petersburg, Virginia redistricting plan which secured white voter control despite the city having a 61% black population. *Id.* at 188.

[25] *Id.* at 189. In pointing out the continuing discrimination in voting rights, Congress applauded the Justice Department's objections to statewide redistricting plans following the 1980 census in Virginia, Arizona, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Texas. *Id.* In addition, Congress praised the Justice Department's continuing objections to many of these plans which were submitted repeatedly. *Id.*

[26] *Id.* The report noted that complex rules covering elections provided an arena for subtle changes which could be used to perpetuate the results of past vot-

Thus, in acknowledging the continuing need for section 5 preclearance, Congress concluded that the Justice Department played a vital role in the section's application as the final arbiter of whether a proposal is discriminatory or not. The Justice Department continued to exercise considerable discretion in awarding preclearance to section 5 covered jurisdictions until the Supreme Court decision in *Miller v. Johnson.*

III. *MILLER V. JOHNSON*

A. Majority Opinion

In *Miller v. Johnson*,[27] the United States Supreme Court addressed the issue of the extent to which race is a constitutionally permissible factor to be considered in a state's redistricting plan.[28] In *Miller*, a group of white plaintiffs brought an Equal Protection challenge against Georgia's creation of the majority-black Eleventh Congressional District.[29] The plaintiffs relied upon the Court's decision in *Shaw v. Reno*[30] to support their Equal Protection argument.[31] In *Shaw*, the Court had, for the first time, allowed white voters to challenge districts based upon the Equal Protection Clause, because the shape of the districts was so odd that they could only be explained as an attempt to classify voters according to their race.[32] Accordingly, the plaintiffs in *Miller* argued that Georgia's creation of the Eleventh District had no explanation

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ing discrimination. *Id.*

[27] ___ U.S. ___, 115 S. Ct. 2475 (1995).

[28] *Miller*, 115 S. Ct. at 2482.

[29] *Id.* at 2485. The plaintiffs contended that the district, which was created after the 1990 census, amounted to a racial gerrymander which violated the Equal Protection Clause. *Id.*

[30] ___ U.S. ___, 113 S. Ct. 2816 (1993).

[31] In *Shaw*, the Court found that in order to successfully challenge a redistricting plan under the Equal Protection Clause, the plaintiff must show that on its face, implementation of the plan has no other rational explanation than separation of voters along racial lines. *Shaw*, 113 S. Ct. at 2828.

[32] *Shaw*, 113 S. Ct. at 2828. The Court found that the district in question was unconstitutional because it violated the Equal Protection Clause. *Id.* However, the Court was not willing to say that race may never play a factor in voter redistricting plans. *Id.* at 2826.

apart from the separation of voters based upon race.[33]

In its attempts to redistrict, the General Assembly of the State of Georgia [hereinafter Assembly] was required to obtain preclearance from the Justice Department.[34] Thus, the Assembly submitted its initial plan which outlined the creation of two majority-black districts in addition to a black-influenced district.[35] The Justice Department rejected the Assembly's initial plan because it contained only two majority-minority districts.[36] Accordingly, the Assembly designed a new redistricting plan which enhanced the black population in three districts as well as placing the black population of a county in the Eleventh District.[37] The Justice Department again refused to preclear the plan, noting an alternative plan developed by the ACLU that created three majority-black districts.[38] The Assembly then designed a plan which created three majority-black districts as outlined in the alternative suggested by the Justice Department.[39] The Justice Department precleared this plan, and black congressmen were elected from all three of the districts, causing the five white plaintiffs to challenge the Assembly's actions as a violation of the

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[33] *Miller*, 115 S. Ct. at 2485. The Court noted that all but one judge on the district court panel acquiesced in this interpretation. *Id.*

[34] *Id.* at 2483. The Attorney General held that since Georgia was subject to § 4(b) of the Act, it was required to obtain either administrative preclearance from the Justice Department or approval by the United States District Court for the District of Columbia for any change in "standard, practice, or procedure with respect to voting" as required under § 5 of the Act. *Id.* (quoting 42 U.S.C. § 1973(c)); *see supra* notes 5-9 and accompanying text.

[35] *Miller*, 115 S. Ct. at 2483. The Assembly created this plan in response to the 1990 census which revealed that the state's population entitled it to an 11th congressional seat. *Id.* The plan provided for two majority-minority districts in the 5th and 11th districts. *Id.* A third congressional district, the 2d, contained a 35% black voting age population. *Id.*

[36] *Id.* The Justice Department noted in its rejection letter that the plan "did not 'recognize' certain minority populations by placing them in a majority-black district." *Id.* at 2484.

[37] *Id.*

[38] *Id.* The ACLU suggested utilization of a "max-black" plan to enhance the representation of minority voters. *Id.*

[39] *Id.* The Assembly used the ACLU's "max-black" plan as a guidance in drafting its third plan. *Id.* at 2484.

Equal Protection Clause.[40] In a five to four decision,[41] the United States Supreme Court held that the Georgia Assembly's actions were in violation of the Equal Protection Clause.[42] Justice Kennedy delivered the majority opinion, affirming the holding of the district court.[43]

Initially, the majority reviewed the evidence that the district court had relied upon in determining that race was the overriding factor behind the Assembly's redistricting decision.[44] The Court applied strict scrutiny in reviewing the redistricting plan, holding it unconstitutional because the Georgia legislature subordinated traditional redistricting principles to race.[45] Focusing on the ideal of a "color-blind" constitu-

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[40] *Miller*, 115 S. Ct. at 2485.

[41] *Id.* at 2482. The majority included Chief Justice William H. Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.*

[42] *Id.* at 2490.

[43] *Id.* The district court interpreted *Shaw v. Reno* as requiring strict scrutiny "whenever race is the 'overriding, predominant force' in the redistricting process." *Id.* After citing evidence of the legislature's purpose in the redistricting plan and the unusual shape of the 11th district, the district court applied strict scrutiny and struck down the Assembly's plan, stating that race was the overriding force in the districting determination. *Id.* Although the district court found that compliance with the Voting Rights Act was a compelling interest, it did not find the redistricting plan to be narrowly tailored to this interest. *Id.* The court held that the Act did not require the creation of three majority-black districts. *Miller*, 115 S. Ct. at 2486. Thus, the district court rejected the Justice Department's earlier determination that the Act required the creation of three majority-minority districts.

[44] *Id.* at 2489. The evidence considered by the district court included testimony from the operator of Georgia's reapportionment computer, correspondence between the Assembly and the Justice Department, and the bizarre shape of the new district. *Id.*

[45] *Miller*, 115 S. Ct. at 2490-91. In a separate concurring opinion, Justice O'Connor stated that although the majority's threshold standard, that traditional redistricting principles may not be subordinated to racial considerations, was a demanding standard, it will help "achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review." *Id.* at 2497 (O'Connor, J., concurring).

Justice Stevens dissented from the majority holding, stating that the white plaintiffs lacked standing to challenge the Georgia Assembly's redistricting plan under a *Shaw* Equal Protection claim. *Id.* (Stevens, J., dissenting). Justice Stevens argued that the majority's conclusion that the white plaintiffs had standing under *Shaw* was flawed, because it assumed that the plaintiffs' placement in the 11th district alone caused them to suffer representational harm. *Id.* at 2497

tion,[46] the Court held that compliance with the Justice Department's demands did not constitute a compelling interest under the facts of this case.[47] The Court then attacked the Justice Department's role in preclearing redistricting plans.[48]

B. The Majority's Attack on the Justice Department

Although courts have traditionally given broad deference to agency decisions,[49] the Supreme Court held that the Justice Department was not accorded deference in this case because its interpretations "raise[d] serious constitutional questions."[50] The Court stated that because Georgia's initial plans were "ameliorative," they did not violate section 5 of the Act.[51] In its criticism of the Justice Department, the Court

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(Stevens, J., dissenting).

Justice Ginsburg, with whom Justices Stevens and Breyer joined, and with whom Justice Souter joined as to Part III-B (the strict scrutiny standard issue), also wrote a separate dissenting opinion. The thrust of Justice Ginsburg's dissent focused on the majority's adoption of a new threshold standard which triggers strict scrutiny in cases where race-neutral redistricting factors have been subordinated to race. *Id.* at 2506 (Ginsburg, J., dissenting). Justice Ginsburg stated that adoption of such an encompassing standard would create a Voting Rights Act case where the plaintiffs merely show that traditional redistricting principles carried less weight than race. *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting).

[46] *Id.* at 2493. The Court stated that "[o]nly if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race." *Id.* at 2494.

[47] *Id.* at 2494.

[48] *Id.* at 2493.

[49] *See* Presley v. Etowah County Comm'n, 502 U.S. 491, 508-09 (1992) (stating Attorney General's decisions regarding preclearance are generally given deference by courts); Morris v. Gressette, 432 U.S. 491, 504-05 (1979) (holding Justice Department not subject to judicial review when acting in its capacity under § 5).

[50] *Miller*, 115 S. Ct. at 2491 (citing Edward J. DeBartolo Co. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988)).

[51] *Id.* at 2492. "Ameliorative" refers to those plans which increase the number of majority-minority districts. Beer v. United States, 425 U.S. 130, 141 (1976). In *Miller*, the majority relied upon its decision in *Beer* for the proposition that where a redistricting plan is ameliorative, it does not violate § 5 unless it "so discriminates on the basis of race or color as to violate the Constitution." *Miller*, 115 S. Ct. at 2492 (quoting *Beer*, 425 U.S. at 141).

In *Beer*, the Supreme Court held that a legislative reapportionment should receive preclearance under § 5 where under the "retrogression test" it enhances,

stated that it found no indication of congressional intent to extend the authority granted under section 5 so broadly.[52]

IV. THE CONFLICT BETWEEN CONGRESS AND THE SUPREME COURT

The Supreme Court's holding in *Miller* seems to be in direct conflict with the congressional intent behind the Voting Rights Act. Specifically, the Court's adherence to the concept of "color-blindness" does not comport with the concept behind, nor the operation of, the Act. In *Miller*, the Supreme Court, in striking down Georgia's creation of three majority-minority voting districts, stated, "[W]hen a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. Rather, we insist on a strong basis in evidence of the harm being remedied."[53] Thus, it is the Court's view that unless a state can demonstrate "a strong basis in evidence" of past discrimination, it cannot factor race more heavily then race-neutral factors in redistricting efforts.[54] Accordingly, without a specific showing each time it wants to enact a new voting standard, practice or procedure, a state, under *Miller*, must remain "color-blind" in the enactment of voting changes.

However, the Supreme Court failed to consider that under the Voting Rights Act, states subject to section 5 preclearance were selected based on criteria which indicate past and pres-

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or at a minimum does not change, the minority electoral position and does not unconstitutionally discriminate against minorities. *Beer*, 425 U.S. at 141. Accordingly, the majority in *Miller* stated that the Voting Rights Act did not require the creation of the third majority-black district in Georgia. *Miller*, 115 S. Ct. at 2492. In addition to attacking the Justice Department's objection to the Assembly's initial proposals and interpreting the requirements of § 5, the majority stated that a covered state or jurisdiction has no compelling interest in complying with Justice Department preclearance requirements. *Id.* at 2491.

[52] *Miller*, 115 S. Ct. at 2493. The majority also stated that the Justice Department's policy of maximizing black votes was "far removed" from the purpose of § 5, which was to prevent practices which weaken the minority vote. *Id.*

[53] *Id.* at 2491.

[54] *Id.*

ent voting rights discrimination.[55] Therefore, Congress deemed it necessary that these states consider race in implementing new voting practices in order to achieve equal opportunity in voting rights.[56] In the interest of ensuring expediency in eliminating discriminatory voting practices in these states, Congress identified those states and political subdivisions with a history of past voting inequality, required those entities to act in a color-conscious manner, so as to remedy past inequality.[57]

Clearly these two theories are in direct conflict. On one hand, the Supreme Court seems to suggest that consideration of race is no longer permissible to achieve voting rights equality in section 5 jurisdictions, which are explicitly singled out by evidence of past and present discriminatory practices alone.[58]

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[55] *See supra* notes 5-6 and accompanying text. The following states were deemed "target states" at the time of the Act's adoption: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, one county in Arizona, one county in Idaho, one county in Maine and 34 counties in North Carolina. H.R. REP. NO. 439, 89th Cong., 1st Sess. 13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2445. A state or jurisdiction was deemed a "target state" where the jurisdiction had been utilizing tests or practices as preconditions to voter registration, and less than 50% of the population was registered as of November 1, 1964 or less than fifty-percent of the population voted in the 1964 presidential election. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973b (1994)).

[56] The Act required target states to suspend all devices and tests used as preconditions to registration and required covered jurisdictions to bear the burden of proving that any proposed change in voting practices did not have the purpose or effect of discriminating based upon race. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. 1973c (1994)); *see also* 28 C.F.R. §51.52 (1995) (setting forth burden of proof for covered jurisdictions).

[57] *See supra* notes 4-6, 16, 18 and accompanying text. A covered jurisdiction is forced to act in a "color-conscious" way under the preclearance requirement of § 5, because in order to receive Justice Department preclearance or a declaratory judgment in its favor, the covered jurisdiction must design the proposed change in a way which does not have the effect nor purpose of discriminating based upon race or color. *See* AVILA, *supra* note 5, at 145 (outlining preclearance process).

[58] *See supra* notes 4, 6, 16 and accompanying text. The majority in *Miller* not only suggested that the consideration of race was no longer necessary to achieve voting rights equality, but also stated that considering race enhances discrimination. *Miller*, 115 S. Ct. at 2493. The Court stated that the Justice Department's use of § 5 to require the creation of a majority-black district was "a shortsighted

On the other hand, Congress has categorized these states and required them to act in a "color-conscious" way to accomplish voting rights equality.[59] Perhaps the majority in *Miller* felt that such color-conscious decisions are no longer necessary to achieve equal opportunity in voting rights.[60] However, this determination ignores the fact that minorities continue to suffer inequality in the political processes.[61]

The conflict between Congress' and the Supreme Court's approaches to remedying past and present voting rights discrimination has created much confusion regarding enforcement of section 5. Specifically, the Justice Department's role under section 5 has become somewhat unclear and diluted following the Court's decision in *Miller*.

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and unauthorized view of the Voting Rights Act . . . [which] demand[ed] the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 2494.

[59] The primary goal of the Voting Rights Act was to achieve increased voter registration and voting rights equality in areas with a history of voting inequality. *See supra* notes 3-4 and accompanying text. Because the prior Civil Rights Acts proved inadequate to achieve this goal, Congress deemed it necessary to resort to a more demanding remedy which required certain jurisdictions to actively refrain from voting practices which discriminated. *See supra* notes 16-17 and accompanying text.

[60] The Voting Rights Act of 1965 has increased minority voter registration, election to office, and voting in many states. Motomura, *supra* note 7, at 189-90.

[61] Days, *supra* note 21, at 69. Further, Congress, in discussing the most recent decision to expand the preclearance requirement to § 5, cited numerous examples of continuing discrimination in § 5 covered jurisdictions. *See supra* notes 11-14 and accompanying text. In addition to applauding the Justice Department's many objections to proposals which were deemed to have discriminatory effects and purposes, Congress noted evidence of many jurisdictions which simply did not comply with § 5's preclearance requirements. S. REP. NO. 417, 97th Cong., 2d Sess. 12-15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 190-91. Congress pointed to noncompliance in the form of failure to submit proposed changes to the Justice Department, as well as in the form of implementing changes which the Justice Department refused to preclear. *Id.* In justifying the continuing need for § 5's preclearance requirement, Congress pointed to this evidence of continuing discrimination and noncompliance, stating that "many of the advances of the past decade could be wiped out overnight with new schemes and devices." *Id.* at 187.

V. The Impact of the Supreme Court's Attack on the Justice Department in *Miller*

The potential impact of *Miller* on the future of the Justice Department's role under section 5 and the survival of section 5 itself is only beginning to emerge. However, the cases of *Dillard v. City of Greensboro*[62] and *Johnson v. Miller*[63] provide insight into the potential impact of the *Miller* decision.

In *Dillard*, the Eleventh Circuit Court of Appeals had the opportunity to review a redistricting decision made by the City of Greensboro, Alabama following the Supreme Court's *Miller* holding.[64] The dispute in *Dillard* arose from two competing redistricting plans presented by the City of Greensboro and Dillard, who represented black citizens in the community.[65] The district court initially adopted Greensboro's single-member district plan which created three of five majority-black districts.[66] However, the Attorney General refused to grant preclearance to the plan on the basis that it did not adequately prevent racial gerrymandering.[67] Greensboro then submitted a new plan which also created three of five majority-black districts, but included a larger black voting age population in a fourth district.[68] The Attorney General again refused to

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[62] 74 F.3d 230 (11th Cir. 1996).

[63] No. CV 194-008, 1995 WL 783038 (S.D. Ga. Dec. 13, 1995).

[64] *Dillard*, 74 F.3d at 231. The Eleventh Circuit reviewed the case following the district court's order that Greensboro implement a redistricting plan which created three of five majority-minority districts. *Id.* at 232.

[65] *Id.* at 231. Initially, Dillard instituted a § 2 action to have the city's at-large election system removed. *Id.* In 1987, Dillard and the city entered into a consent decree, whereby the city acknowledged that its at-large election system violated § 2. *Id.* Following the 1990 census, both Dillard and Greensboro submitted competing single-member district plans. *Id.*

[66] *Id.* The three districts in the Greensboro plan contained a black voting age population of 83%, 58% and 75%. *Id.* at 231-32. Two of the districts elected black council members. *Id.* Voters in District 2, which had a black voting age population of 58%, elected a white council member over a black candidate. *Id.*

[67] *Id.* at 232. The Attorney General pointed to the fact that a white candidate was elected from District 2 and stated that the plan "fragmented black population concentrations in order to lower the black percentage in District 2." *Id.* (citing Attorney General objection, R2-66-2).

[68] *Id.* The city enhanced the black voting-age population in District 2 from

preclear the plan, finding that the plan still hampered black voters' electoral choices.[69] Following this rejection of Greensboro's plan, Dillard filed a renewed motion for further relief, requesting that the court adopt his plan.[70] The district court adopted Dillard's plan and ordered new elections, causing Greensboro to file an action alleging that the plan was "a race-conscious effort to guarantee direct proportionality of representation by manipulating district lines."[71]

The Eleventh Circuit refused to affirm the district court's decision, vacating and remanding the case in light of the Supreme Court's decision in *Miller*.[72] In addition to remanding the standards set forth in *Miller*, the Eleventh Circuit criticized the district court's reliance on the Attorney General's objections, stating that the court's only reason for adopting Dillard's plan was to accommodate the desires of the Attorney General.[73]

58% to 63%. *Id.*

[69] *Dillard*, 74 F.3d at 232. The Attorney General found that the new plan was "calculated to limit black voting strength." *Id.* (citing Attorney General objection, R2-90-Attach., at 2). In stating its decision, the Attorney General pointed to continued racially polarized voting, fragmentation of black population concentrations and the reduction in black voter participation. *Id.* (citing Attorney General objection, R2-90-Attach., at 2).

[70] *Id.* Dillard's plan created three of five majority-black districts, consisting of black voting-age populations of 85%, 80%, and 76%. *Id.*

[71] *Id.* The issue before the Eleventh Circuit was whether Dillard's plan violated § 2 of the Voting Rights Act or failed to remedy Greensboro's violation of § 2. *Id.* The appellate court examined the district court's decision under the "clearly erroneous" standard of review. *Id.* at 232-33.

[72] *Id.* at 236. The Eleventh Circuit recited the facts and holding of *Miller*. *Id.* at 233. The court rejected Dillard's argument that the case was distinguishable from *Miller* because a federal district court, as opposed to the legislature, had adopted the redistricting plan. *Id.* The Eleventh Circuit stated that if on remand, Greensboro could show that race was subordinated to other race-neutral redistricting criteria, then the plan must satisfy strict scrutiny analysis before being implemented. *Id.* at 236. The Eleventh Circuit Court of Appeals stated that the record indicated "an overwhelming emphasis on race with little or no examination of race-neutral districting principles." *Dillard*, 74 F.3d at 234.

[73] *Id.* at 236. The Eleventh Circuit held that Greensboro's heavy reliance on the Attorney General's opinion conflicted with the Supreme Court's holding in *Miller*. *Id.* Because the *Miller* Court held that the Georgia Assembly's attempt to comply with the Justice Department failed to rise to the level of a compelling interest and was therefore unconstitutional, the Eleventh Circuit similarly objected

The Eleventh Circuit's decision in *Dillard* suggests the potential impact of the Supreme Court's criticism of the Justice Department in *Miller*. In *Dillard*, the Eleventh Circuit not only criticized the district court's reliance upon Justice Department standards for preclearance, but took *Miller* a step further by applying the case to a federal district court's redistricting decision, as opposed to a legislature's decision.[74] The *Dillard* holding is indicative of the post-*Miller* trend toward discouraging legislatures and courts from strictly adhering to Justice Department preclearance decisions under section 5. More indicative of this trend, however, is the result of the Georgia Assembly's attempt to redistrict which prompted *Miller v. Johnson*. This result is represented in the recent case of *Johnson v. Miller*.[75]

In *Johnson*, the Georgia legislature asked the federal district court to redraw Georgia's congressional districts, so as to bring them into compliance with the *Miller* holding.[76] Traditionally courts are only allowed to make minor changes when redrawing voting districts, in order to closely reflect the legislature's intent.[77] However, the district court in *Johnson* found that this standard did not apply to it because of the Justice Department's interference with the Assembly's previous redistricting decision.[78] Thus, the district court ignored

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to the district court's reliance on the Justice Department's demands. *Id.*

[74] *See supra* notes 73-74 and accompanying text.

[75] Johnson v. Miller, No. CV 194-008, 1995 WL 783038, at *3 (S.D. Ga. Dec. 13, 1995). This case represents the aftermath of the Supreme Court's decision in *Miller*. *Johnson*, 1995 WL 783038, at *1. After the Supreme Court affirmed the district court's decision declaring the 11th District unconstitutional, the district court held a hearing to address the issue of designing a remedy. *Id.* After trial, the district court held that in addition to the 11th District, the 2d District, which was also majority-black, was unconstitutional. *Id.*

[76] *Johnson*, 1995 WL 783038, at *1. Initially, the district court had given the legislature the opportunity to redraw the districts. *Id.* However, because of impending elections in 1996, the legislature informed the court that it would not be able to redraw the districts. *Id.* Thus, the task was left to the court. *Id.*

[77] Upham v. Seamon, 456 U.S. 37, 42 (1982). In *Upham*, the Supreme Court stated that the reason for this standard, where the court generally stands in the place of the legislature, lies in the fact that redistricting is primarily a political task which is better left to legislatures than to courts. *Upham*, 456 U.S. at 41-42.

[78] *Johnson*, 1995 WL 783038, at *2-3. The district court pointed to the pre-

the previous redistricting plan which the Justice Department precleared, and redrew the districts according to its own standards.[79] The court's redistricting plan contained one majority-black district out of a total of eleven districts.[80] The majority-minority district had a black voting age population of 57.17 percent.[81] The previous redistricting plan, which the Justice Department precleared, contained three majority-black districts.[82] The *Johnson* decision is the first instance of a section 5 covered state evading Justice Department preclearance. Because the district court was able to redraw the districts, Georgia now has only one majority-black district out of its eleven congressional districts. Prior to the 1990 census, Georgia had one majority-black district out of ten congressional districts.[83] Thus, because of the Supreme

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vious Justice Department objections and stated that the Justice Department "basically used the preclearance process to force Georgia to adopt the ACLU redistricting plan and, in the process, subvert its own legislative preferences to those of the DOJ." *Id.* at *2. The court stated that because the Justice Department interfered with the Georgia Assembly's redistricting process by refusing to preclear several of its plans, the current plan, which the Supreme Court declared unconstitutional, did not reflect the true intent of the legislature nor the historic policies of the State of Georgia. *Id.* Accordingly, the court held that it was not bound by the standard in *Upham*. *Id.* at *3.

In *Upham*, the district court redrew congressional districts after the Justice Department refused to grant preclearance. *Upham*, 456 U.S. at 43. However, the Supreme Court held that the district court erred and could not redraw the districts in the absence of a finding that the plan offended either the Constitution or the Voting Rights Act. *Id.*

[79] *Johnson*, 1995 WL 783038, at *3. The court looked to several factors in redrawing the districts, including the notion of "one person, one vote," adherence to the state's historical districts, and the state's traditional redistricting factors, including §§ 2 and 5 of the Voting Rights Act. *Id.* at *3-11.

[80] *Id.* at *11 app. A.

[81] *Id.* This majority-black district (District 5) contains a 61.99% black population. *Id.*

[82] Miller v. Johnson, ____ U.S. ____, 115 S. Ct. 2475, 2484 (1995). The Georgia Assembly's first redistricting plan, which the Justice Department refused to preclear, only contained two majority-black districts and one minority-enhanced district. *Miller*, 115 S. Ct. at 2483. Presumably the first plan was devised in the absence of Justice Department influence over the Assembly. Thus, this plan probably most closely represents the legislature's true intent. *Id.*

[83] *Miller*, 115 S. Ct. at 2483. Georgia's districts remained the same from 1980 to 1990. *Id.* The 1990 census revealed the state was entitled to an 11th congres-

Court's decision in *Miller*, black voters in Georgia now have less representation than they did prior to 1990. *Johnson* not only represents a trend toward condemning attempts at strict compliance with Justice Department preclearance demands, but also points toward the potential results of ignoring these demands, i.e., less representation for minority voters.[84]

VI. CONCLUSION

Many experts have commented on and attempted to predict the possible implications of the Supreme Court's decision in *Miller*.[85] These reactions indicate that many informed com-

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sional seat. *Id.*

[84] In addition to the *Johnson* decision, the case of *Bossier Parish School Board v. Reno* also represents the results of the post-*Miller* trend toward ignoring Attorney General preclearance demands. Bossier Parish Sch. Bd. v. Reno, 907 F. Supp. 434 (D.D.C. 1995). In *Bossier Parish*, the District Court for the District of Columbia was asked to preclear a school board redistricting plan in Bossier Parish, Louisiana, which the Attorney General had refused to preclear. *Bossier Parish*, 907 F. Supp. at 437-40. The proposed plan emulated a previous redistricting plan which received Justice Department preclearance in 1991. *Id.* at 435. The approved plan provided for no majority-black districts. *Id.* However, in 1993 the Attorney General objected to the Bossier Parish school board's adoption of the previously approved plan because new information indicated that "black residents [were] sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts." *Id.* at 439. Additionally, the Attorney General took issue with the school board's unwillingness to comply with the requests of black residents. *Id.* Prior to the adoption of the contested plan, the NAACP had submitted proposals which would have enhanced black representation. *Bossier Parish*, 907 F. Supp. at 438. In addition, there were indications that the school board had a discriminatory purpose in adopting the plan. *Id.* at 437-39.

The District Court rejected the Attorney General's findings and granted preclearance to the school board's plan that did not provide for a majority-black district. *Id.* at 448. The court, focusing on the Supreme Court's criticism of the Justice Department in *Miller*, held that the school board made a prima facie case for preclearance by submitting nondiscriminatory reasons for adopting the plan. *Id.* In addition, the court concluded that none of the statements presented by the defendants indicated a discriminatory intent on the part of the school board. *Id.* Thus, the court found that the defendants failed to rebut the school board's prima facie case, necessitating preclearance of the plan. *Bossier Parish Sch. Bd.*, 907 F. Supp. at 450. As a result of the court's rejection of the Attorney General's findings, there is not one majority-black district in Bossier Parish's school board districts.

[85] Laughlin McDonald, director of the ACLU's southern regional office has

mentators feel that the Court's decision in *Miller* will undermine the progress toward voting rights equality that the Voting Rights Act of 1965 has helped to achieve. This speculation is perhaps well-founded for many reasons.

Specifically, the Court's attack on the Justice Department's role under section 5 will significantly impact the enforcement of section 5's preclearance requirement in several ways. First, the Court's decision appears to have started a trend toward ignoring and criticizing Attorney General objections and the older decisions which rely upon them. Recent case law indicates this trend as well as its unfortunate effect, redistricting plans which provide for less minority representation. In addition, the Supreme Court's attack on the Justice Department will impede the department's ability to act freely in implementing the preclearance requirements of the Act. The department, because of the holding in *Miller*, may feel compelled to refrain from objecting to proposals which it would otherwise reject as discriminatory. Further, as a result of *Miller*, section 5 covered jurisdictions are placed in the middle of a conflict between Congress and the Court. On one side, jurisdictions are not supposed to consider race more than any other factor in redistricting. However, at the same time, jurisdictions are required to consider race in order to receive section 5 preclearance. Thus, covered jurisdictions will either have to attempt to disguise their true considerations behind redistricting decisions in order to comply with *Miller*, or ignore the Court's holding in order to receive preclearance. However, considering the strength of the Court's attack on the Justice Department and the post-*Miller* case law further questioning

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stated, "There are thousands of redistricting plans in the South and throughout the country in which racial fairness was taken into account. [After *Miller*], [a]ll of these plans are presumed to be unlawful." Marcia Coyle, *An Emboldened Majority Breaks Ground: Although the Center Wavered, the Court's Rulings Had a Big Effect on Race, Religion and Federalism*, NAT'L L.J., July 31, 1995, at C2. Frank R. Parker of the District of Columbia School of Law has said, "[The majority] see[s] eliminating racial classifications as the key to eliminating discrimination in society. It is an inadequate philosophy, illogical and undefined." Marcia Coyle, *The Court's New View: Colorblind? Rulings Put Heavy Burden on Racial Classifications*, NAT'L L.J., July 10, 1995, at A1.

the validity of the department's decisions, covered jurisdictions may be more inclined to choose the former alternative. In addition, because the Court stated that compliance with Attorney General preclearance decisions alone is not a compelling interest, jurisdictions may decide to avoid the conflict altogether and simply ignore section 5 preclearance requirements.

There is little doubt that the Supreme Court's decision in *Miller* will have a profound impact upon voting rights jurisprudence and administrative enforcement of the Voting Rights Act. Now is the time to initiate close scrutiny of administrative determinations by the Justice Department, as district court cases brought under the *Shaw* and *Miller* standards, to ensure that the Supreme Court's goal of moving toward "colorblindness" will not create "a significant barrier against electoral practices,"[86] increasing voting rights inequality.

Lisa Erickson

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[86] Days, *supra* note 21, at 65.

The Ghost of Harlan: The Unfulfilled Search for Judicially Manageable Standards in Voting Rights Litigation

Introduction

In discussing the ominous future of voting rights litigation, Justice Harlan stated that "[g]eneralities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards."[1] Justice Harlan's statements, echoing similar concerns espoused previously by Justice Frankfurter,[2] could initially be dismissed as the distant

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[1] Reynolds v. Sims, 377 U.S. 533, 621 (1964). Justice Harlan reasoned that

> No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever.

Reynolds, 377 U.S. at 621.

[2] *See* Baker v. Carr, 369 U.S. 186, 266-67 (1962) (Frankfurter, J., dissenting) (criticizing Court's decision to depart with prior case law and accept justiciability of election claim). In his dissent joined by Justice Harlan, Justice Frankfurter argued that "[d]isregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined." *Baker*, 369 U.S. at 267 (Frankfurter, J., dissenting). Justice Frankfurter also noted the Court's failure to provide lower courts a judicially manageable standard for similar cases, stating prophetically that:

> For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial pro-

cry of a man opposed to the very creation of a voting rights jurisprudence.[3] However, the subsequent case law evolution has seen the ghost of Harlan haunt the Court's efforts to adopt, or rather invent, standards which trial and appellate courts can consistently apply in voting rights litigation. The Court first attempted to answer the call of Harlan two years after the *Baker* decision in the case of *Reynolds v. Sims*, an Alabama legislative apportionment case decided on equal protection grounds.[4] Chief Justice Warren, writing for the majority, held that "[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."[5] The majority of the Court fashioned a misleadingly simple test of "equal population," reasoning that "[w]hatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[6] The extension of the doctrine[7]

> priety. . . . Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlies these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges.

Id. at 268 (Frankfurter, J., dissenting). Justice Frankfurter characterized this lack of judicial standards as the "dominant consideration" before the Court. *Id.* at 283 (Frankfurter, J., dissenting).

[3] *See id.* at 340 (Harlan, J., dissenting) (stating that election claim of Tennessee voters was nonjusticiable and therefore voting to affirm dismissal of claim). Justice Harlan reasoned that the "lack [of] standards by which to decide such cases as this, is relevant not only to the question of 'justiciability,' but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case." *Id.* at 337 (Harlan, J., dissenting).

[4] *Reynolds*, 377 U.S. at 565-68.

[5] *Id.*

[6] *Id.* at 579. Justice Clark, in his concurrence, described the "equal population" standard as a combination of the "one person, one vote" principle espoused in Gray v. Sanders, 372 U.S. 368, 381 (1963), and the "'nearly as is practicable'

was accompanied by immediate problems with its application, the foremost being the extent to which deviations in population would be permitted.[8] The Court quickly retreated from its position of requiring strict adherence to population equality in state or municipal apportionment plans,[9] instead noting that a manageable judicial standard requires a certain "flexibility in municipal arrangements."[10] Although population equality was achieved, the use of multimember districts averted the effects of the "equal population" test since minority votes could be diluted nevertheless.[11] The Court again struggled with the establishment of a legal standard to review multimember districts, although the Court stated that review could not be based on a proportional representation analy-

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admonition" set forth in Wesberry v. Sanders, 376 U.S. 1, 8 (1964). *Reynolds*, 377 U.S. at 587 (Clark, J., concurring). Justice Clark also noted the vague nature of this combination, questioning what deviations from perfect population equality were acceptable under the new standard. *Id.* at 588 (Clark, J., concurring).

[7] *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 483-85 (1968) (extending doctrine to cover case of apportionment by local government). Justice Harlan again dissented, rejecting the basic philosophy behind the "equal population" test and therefore refusing to vote for any extension of that doctrine. *Avery*, 390 U.S. at 487 (Harlan, J., dissenting).

[8] *See, e.g.*, Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) (requiring strict adherence to "equal population" standard in congressional redistricting case); Wells v. Rockefeller, 394 U.S. 542, 546 (1969) (same). In *Kirkpatrick*, Justice Harlan argued that the requirement of strict adherence constituted an extension of the *Reynolds* doctrine. *Kirkpatrick*, 394 U.S. at 550 (Harlan, J., dissenting). Justice White labeled the new adherence as an example of "a confusion of priorities," subverting any legislative redistricting concerns to the values of "equal population." *Id.* at 555 (White, J., dissenting).

[9] *See* Karcher v. Daggett, 462 U.S. 725, 730 (1983) (basing continuation of "equal population" requirement in congressional apportionment plans on mandate of U.S. CONST. art. I, § 2); *Wesberry*, 376 U.S. at 18 (same).

[10] Abate v. Mundt, 403 U.S. 182, 185 (1971); *see also* Gaffney v. Cummings, 412 U.S. 735, 740-41 (1973) (placing burden on plaintiff to show population variance); Mahan v. Howell, 410 U.S. 315, 326 (1973) (requiring standard of "substantial equality"). The Court also limited the *Kirkpatrick* holding to cases of congressional redistricting. *Mahan*, 410 U.S. at 326.

[11] *See, e.g.*, Fortson v. Dorsey, 379 U.S. 433, 436 (1965) (refusing to find multimember districts unconstitutional per se). The majority accepted the theory that multimember districts could be employed to submerge minority voting strength, but found nothing in the record that would support such a conclusion to be drawn in the instant case. *Fortson*, 379 U.S. at 437-39.

sis.[12] In the first case where a multimember district was held unconstitutional, the Court based its holding, not on a recognizable judicial standard, but on the "totality of the circumstances."[13]

The early voting rights decisions of the Supreme Court are difficult to reconcile as the rationale behind many of the decisions appears inconsistent and is, at the very least, difficult to comprehend.[14] Given this state of the law, one must wonder how the federal courts have dealt with such cases in the past thirty years. A review of voting rights case law demonstrates that many early cases presented trial courts with starkly unjust misapportionment and voter dilution situations. Therefore the lack of a manageable judicial standard was overcome by a relatively pragmatic approach by the lower courts. While it would be difficult, if not impossible, to prove that lower courts have employed the different legal standards

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[12] Whitcomb v. Chavis, 403 U.S. 124, 156 (1971). In this first case reviewed on the merits, the Court criticized the district court's failure to distinguish between voter dilution and a lack of success at the polls, but the majority failed to provide a judicial standard to guide future reviews. *Whitcomb*, 403 U.S. at 156.

[13] White v. Regester, 412 U.S. 755, 769 (1973). The Court repeated the mandate of *Whitcomb* that the plaintiff must show "that the political processes leading to nomination and election were not equally open to participation by the group in question," but did not elaborate on how the trial court was to analyze such evidence. *White*, 412 U.S. at 766 (citing *Whitcomb*, 403 U.S. at 149-50). The Court instead reiterated the trial court's findings of fact, initially noting the history of discrimination against minority voters in Texas. *Id.* The Court also referred to the meager number of minority candidates elected since Reconstruction, the depressed number of registered Mexican-Americans voters, and the history of "invidious discrimination" against minorities in areas such as education. *Id.* at 766-70. The Court gave no indication of the relative importance of any of the facts, and showed great deference to the trial court's viewpoint in evaluating such local issues "in the light of past and present reality, political and otherwise." *Id.* at 769-70.

[14] *See, e.g.*, Jones v. City of Lubbock, 640 F.2d 777, 777 (5th Cir. 1981) (Goldberg, J., concurring) (expressing confusion and disagreement with Supreme Court's rejection of *Zimmer* test in *Bolden*). Judge Goldberg stated that the Supreme Court's decision "cast[s] aside the ten years of thought, experience and struggle embodied within [*Zimmer*]." *Jones*, 640 F.2d at 777 (Goldberg, J., concurring). However, because of his inability to comprehend the Court's rationale in rejecting the *Zimmer* test, Judge Goldberg reluctantly noted that "mine is not to make reply, mine is not to reason why." *Id.* (Goldberg, J., concurring).

in early voting rights jurisprudence to announce holdings rather than to arrive at them, such a conclusion fits the facts. At the very least, the factual basis that underlay many of the early voting rights cases made the need for the concrete development of a judicially manageable standard less urgent. This comment will examine several of the early voting rights cases that followed *Baker*, particularly those from the Fifth Circuit up through the seminal case of Zimmer v. McKeithen,[15] to examine both the factual challenges facing the trial and appellate courts and the application of the legal standards to resolve those situations.

Unfortunately, today's litigation on voting rights does not fit the old facts. Trial courts, still struggling with traditional voting rights issues, are now faced with situations never envisioned by the *Reynolds* Court, such as multi-ethnic/multi-race districts. This comment will briefly outline the post-*Zimmer* legal standards developed by Congress and the courts as well as examine one constitutional standard proposed by James Blacksher and Larry Menefee in their 1982 article on the subject.[16] The next step will be to lay these present standards upon more recent factual situations and examine the viability of the standards. This experiment leads back to the very concerns espoused by Harlan thirty years ago. Post-*Gingles* decisions demonstrate that present judicial standards fail to "provide a principled basis for judicial review and consistency of result in a variety of circumstances and in a variety of courts."[17] Voting rights jurisprudence is today at a crossroads, and the Supreme Court must develop and adopt a workable and stable judicial standard to guide the lower courts through these new situations and the new factual challenges that will inevitably arise.

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[15] 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *cert. granted sub nom.*, East Carroll Sch. Bd. v. Marshall, 422 U.S. 1055 (1975), *aff'd*, 424 U.S. 636 (1976).

[16] James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982).

[17] *Id.* at 51.

I. Early Voting Rights Cases in the Fifth Circuit

The trial courts handling the first cases to follow the *Baker* decision were faced with the unenviable task of adjudicating claims without an announced standard.[18] In the 1962 case of Sims v. Frink,[19] voters challenged the failure of the Alabama legislature to reapportion itself since 1900, claiming they were denied equal protection of the law under the Fourteenth Amendment.[20] The Alabama district court looked, in the absence of any direction from the Supreme Court, to decisions of other district courts faced with similar situations to decide the appropriate substantive standard of review.[21] The court concluded that the proper test was one of "invidious discrimination,"[22] first espoused twelve years earlier by Justice Douglas in his dissent in *South v. Peters*.[23] However, the pro-

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[18] *See supra* note 2 and accompanying text.

[19] 208 F. Supp. 431 (M.D. Ala. 1962), *aff'd*, Reynolds v. Sims, 377 U.S. 533 (1964).

[20] *Frink*, 208 F. Supp. at 433. The plaintiffs also claimed that the failure to reapportion violated certain sections of the Alabama Constitution of 1901. *Id.* In a prior order, the same court directed the State of Alabama to take reapportionment steps to comply with its duties under the Alabama Constitution. *Id.* at 434-35. The legislature responded with passage of the "67-Senator Amendment" to the Alabama Constitution, subject to ratification by the state's voters, and the "Crawford-Webb Bill." *Id.* at 435.

[21] *Id.* at 436 (citing Sanders v. Gray, 203 F. Supp. 158 (D.C. 1962)); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962). Moss v. Burkart, 207 F. Supp. 885 (W.D. Okla. 1962).

[22] *Frink*, 208 F. Supp. at 436 (citations omitted). The district court, relying on the rationale of Judge Bell in the *Sanders* decision, listed the relevant factors for consideration as the "rationality or irrationality of state policy, whether or not the system is arbitrary, whether or not the system has a historical basis in our political institutions—federal or state, the presence or absence of political remedy, and the delicate relationship between the federal and state governments under the Constitution." *Id.* at 436-37.

[23] 339 U.S. 276, 281 (1950) (Douglas, J., dissenting). *South* involved a challenge to the Georgia State Democratic Executive Committee's adherence to a Georgia statute which required a primary election to be determined by a county unit vote. *South*, 339 U.S. at 276-77. The Supreme Court affirmed the district court's dismissal of the plaintiffs' petition, holding that "federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a State's geographical distribution of electoral strength among its political subdivisions." *Id.* at 277. On the other hand, Justice Douglas reasoned that the importance of the issue before the Court necessitated, at the very least, an invidious

cess of deciding the proper test was in large part formalistic. The Court examined the starkly unjust scenario, including the recent actions of the Alabama legislature, and held that "[w]e find that each of the legislative acts, when considered as a whole, is so obviously discriminatory, arbitrary and irrational that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the test."[24]

Following the Supreme Court's "equal population" holding in *Reynolds*,[25] the same district court was required to reevaluate the Alabama reapportionment situation in *Sims v. Baggett*.[26] One would expect that the court's determination would be dramatically altered by the *Reynolds* holding, particularly in light of the fact that the *Frink* court had no such guidance, but the *Baggett* opinion does not support that proposition. The district court noted the population standard set forth by the Supreme Court, but also took note that deviations under the new standard were subject to judicial scrutiny and hence an evaluation of the purposes behind the deviations was proper.[27] This loophole in the new standard, noted previously by Justice Clark in his *Reynolds* concurrence,[28] led the district court back to an analysis of the legislature's purposes in gerrymandering the electoral districts,[29] an analysis surprisingly similar to that taken by the court in its "invidious dis-

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discrimination inquiry of the statute. *Id.* at 281 (Douglas, J., dissenting).

[24] *Id.* at 437. The court noted that the dominant indication of the "invidiousness" was the marked disparity in population in the different counties. *Id.*

[25] *See supra* note 6 and accompanying text.

[26] 247 F. Supp. 96 (M.D. Ala. 1965).

[27] *Baggett*, 247 F. Supp. at 104.

[28] *See supra* note 6 and accompanying text.

[29] *Baggett*, 247 F. Supp. at 104-05. The district court noted that "[g]errymandering of either House of the Legislature for the purpose of preventing the election of Negroes to membership would furnish no rational ground for departure from reapportionment strictly according to population." *Id.* at 104. The court then evaluated this practice under pre-*Reynolds* case law, stating that "[w]hatever may be said of gerrymandering in general, gerrymandering of either House of the Legislature for the purpose of preventing the election of Negroes to membership takes a 'controversy out of the so-called 'political' arena and [places it] into the conventional sphere of constitutional litigation.'" *Id.* at 104-05 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

crimination" test in *Frink*.[30] The court placed emphasis on what it perceived to be the discriminatory intent of the Alabama legislature.[31] Even in the court's calculations of a constitutionally-permissible apportionment scheme, the driving factor often appears to be an evaluation of the fairness of the legislature's apportionment decisions. For example, the court determined that legislative placement of Madison County as a separate senatorial district met constitutional muster because the decision was backed by "legitimate considerations incident to the effectuation of a rational state policy."[32] In general, the district court was able to avoid the confusion inherent in the *Reynolds* test by adjusting from a legal standard of "what is constitutional" to a pragmatic standard of "what is fair."

Cases such as *Frink* and *Baggett* were not unusual in the Fifth Circuit where early voting rights litigation was marked by as many cases of vote denial as vote dilution.[33] A perfect example is the case of *Hamer v. Campbell*,[34] where a district court had previously ordered Sunflower County, Mississippi to allow African-American citizens the opportunity to register to vote.[35] Registration was permitted in accordance with the

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[30] *See supra* notes 23, 24 and accompanying text.

[31] *Baggett*, 247 F. Supp. at 109. The court stated that:

> With the pattern and practice of discrimination in Alabama as a backdrop, the cavalier treatment accorded predominately Negro counties in the House plan takes on added meaning. The court is permitted to find the intent of the Legislature from the consistency of inherent probabilities inferred from the record as a whole. We, therefore, hold that the Legislature intentionally aggregated predominately Negro counties with predominately white counties for the sole purpose of preventing the election of Negroes to House membership.

Id.

[32] *Id.* at 106. The court further "buttressed" this determination by noting that the *Reynolds* holding allowed deviations in one house of a bicameral legislature to balance apportionment inequities in the other house. *Id.* (citing Reynolds v. Sims, 377 U.S. 533, 577 (1964)).

[33] *See, e.g.*, Dent v. Duncan, 360 F.2d 333, 333 (5th Cir. 1966) (per curiam) (holding that literacy requirements were unconstitutional in light of South Carolina v. Katzenbach, 383 U.S. 301 (1966)); United States v. Dogan, 314 F.2d 767 (5th Cir. 1963) (enjoining use of poll tax).

[34] 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S 851 (1966).

[35] *Hamer*, 358 F.2d at 217. The district court had ordered a one year

court order, but African-American citizens were denied the actual right to vote on the basis of various voter requirements still in effect in Mississippi.[36] In response, the Fifth Circuit set aside election results from the town of Sunflower, basing their holding on statutory interpretation and the broad equitable powers of the court, and specifically distinguished this case of vote "deprivation" from cases, such as *Reynolds*, involving vote dilution.[37] Cases of vote deprivation, such as *Hamer*, reveal the "pattern and practice of racial discrimination"[38] which served as the backdrop for early vote dilution cases. In this context, the emergence of a pragmatic judiciary was a necessity if the courts were to address starkly unjust situations, especially in light of the failure of the Supreme Court to establish workable standards in vote dilution determinations.

The case of *Smith v. Paris*[39] provides another example of a court adopting a pragmatic approach to deal with a starkly unjust situation where the standards provided by the Supreme Court failed to solve the problem facing the trial court. In *Smith*, the Barbour County Democratic Executive Committee had altered its method of electing members from a beat basis to an at-large system, allegedly for the purpose of denying minorities the ability to elect members to the committee.[40]

"'freeze' . . . to allow the deprived Negroes a chance to catch up and to participate in the electoral process on the same basis on which white citizens [had] participated." *Id.*

[36] *Id.* Mississippi law required a voter in municipal elections to be registered more than four months prior to the upcoming primary or election. *Id.* (citing MISS. CODE ANN. § 3374-60 (1942)). The right to vote was also conditioned on the payment of a poll tax in the two years immediately preceding the upcoming election. *Id.* at 218 (citing MISS. CODE ANN. §§ 3130, 3160 (1942)). These two requirements effectively defeated the district court order since registration was permitted but the right to vote was denied. *Id.*

[37] *Id.* at 221-22. The court noted that the recent reapportionment cases had reinforced the court's right to enjoin an election. *Id.* at 221.

[38] *Id.* at 217.

[39] 257 F. Supp. 901 (M.D. Ala. 1966), *modified by* 386 F.2d 979 (5th Cir. 1967).

[40] *Smith*, 257 F. Supp. at 902-03. The change in election method coincided with the increased registration of minority voters throughout the county. *Id.* This new surge in registration had created a majority-minority situation in several of the beats in Barbour County. *Id.*

The district court began its opinion by concluding that the restructuring of the election system "was born of an effort to frustrate and discriminate against Negroes in the exercise of their right to vote."[41] The court then focused primarily on "the long history of racial discrimination in Alabama,"[42] specifically rejecting the defendants' argument that the new election system was adopted to comply with the "one-man, one-vote" standard of *Reynolds* and other reapportionment cases.[43] By de-emphasizing the importance of the *Reynolds* standard and instead taking a more pragmatic approach, the district court was able to rectify an obvious case of voting rights discrimination despite the lack of a viable judicial standard.[44]

Even in light of this pragmatic judicial approach to voting rights claims, the need for a judicially manageable standard continued to assert itself. The Fifth Circuit attempted to fill this void in the 1973 case of *Zimmer v. McKeithen*,[45] where minority voters from the East Carroll Parish in Louisiana challenged the adoption of an at-large election system.[46] The district court's handling of the case clearly exemplifies a situation in which the blanket application of the Supreme Court's "equal population" test failed to rectify a starkly unjust situation. The district court held that since the at-large

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[41] *Id.* at 904. The court found the actions of the committee to violate both the Fifteenth Amendment and 42 U.S.C. § 1981. *Id.*

[42] *Id.* (quoting *Baggett*, 247 F. Supp. at 109).

[43] *Id.* at 904-05. The court characterized this argument as a "sham." *Id.* at 905.

[44] *See also* United States v. Democratic Executive Comm., 288 F. Supp. 943, 947-48 (M.D. Ala. 1968) (setting aside election of committee members after same committee involved in *Smith* restructured election system to require all members to be elected by at-large vote). The court again followed a very pragmatic approach in dealing with the case, stating that "[i]t is a fundamental, familiar, and frequently relied upon principle that public actions designed to discriminate against one race cannot be abided." *Democratic Executive Comm.*, 288 F. Supp. at 945-46.

[45] 485 F.2d 1297 (5th Cir. 1973), *cert. granted sub nom.*, East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 1055 (1975), *aff'd*, 424 U.S. 636 (1976).

[46] *Zimmer*, 485 F.2d at 1300. The parish election system was changed from a ward system to an at-large system pursuant to a district court order. *Id.* at 1301.

plan had, by definition, a zero population deviation, vote dilution was impossible under the *Reynolds* standard.[47] Following a panel affirmation of the case,[48] the full Fifth Circuit was faced with the question of whether to allow an arguably correct application of the *Reynolds* standard to defeat a claim of obvious vote dilution. The Fifth Circuit en banc declined to allow such a result.[49] The court first noted that fair representation required that "in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population."[50] However, to arrive at a determination of whether fair representation existed, the court noted that the Supreme Court had provided a "panoply of factors."[51] Unable to discern any manageable standard per se from the Supreme Court, the Fifth Circuit instead listed several factors relevant to a vote dilution inquiry:

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote re-

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[47] *Id.* The district court's plan required a candidate for either the police jury or the school board to be a resident of the ward from which he sought election, but voting for these candidates was done by all registered voters in the parish. *Id.*

[48] *See* Zimmer v. McKeithen, 467 F.2d 1381 (5th Cir. 1972) [hereinafter *Zimmer*(panel)] (affirming district court's order to adopt at-large plan). The majority of the panel held that an at-large plan could not discriminate against minority voters where the minority commanded a majority of the overall population, though not a majority of registered voters. *Zimmer*(panel), 467 F.2d at 1384.

[49] See *Zimmer*, 485 F.2d at 1308-09 (reversing district court holding and remanding case).

[50] *Id.* at 1303.

[51] *Id.* at 1305.

> quirements, antisingle shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.[52]

The very fact that the Fifth Circuit had to fashion a new test to deal with vote dilution claims indicates their displeasure with the result reached by the district court and panel below. Since a different result was necessary lest a starkly unjust situation continue, the court had no choice but to expand upon the standards previously espoused by the Supreme Court. Moreover, the factors themselves reflect the Fifth Circuit's desire that trial courts take a pragmatic approach in examining the background and full context of the situation. An analysis of the *Zimmer* factors reveals a striking similarity to the pragmatic, results-oriented approaches taken in prior voting rights decisions in the Fifth Circuit.

II. The Continued Search for Manageable Judicial Standards

While the Supreme Court affirmed the *Zimmer* ruling, the Court reserved approval of the new vote dilution factors.[53] Several justices specifically criticized the usefulness of the *Zimmer* factors as a workable judicial standard, calling it a "highly amorphous theory."[54] Furthermore, a new line of equal protection cases, requiring a showing of discriminatory purpose for a plaintiff to succeed, seemed to establish a comprehensive standard of review that would apply to vote dilution cases.[55]

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[52] *Id.* The court stated that the aggregation of these factors proved vote dilution, though all of the factors need not be present in every case. *Id.*

[53] *East Carroll Parish Sch. Bd.*, 424 U.S. at 638.

[54] Wise v. Lipscomb, 437 U.S. 535, 549-50 (1978) (Rehnquist, J., concurring). Chief Justice Burger and Justices Stewart and Powell joined in Justice Rehnquist's criticism of the *Zimmer* test. *Wise*, 437 U.S. at 549 (Rehnquist, J., concurring).

[55] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976). In *Arlington Heights*, the Court held that a real estate developer who had been denied a rezoning permit by local authorities failed to show that discriminatory purpose was a "motivating factor" in that denial. *Arlington Heights*, 429 U.S. at 270. *Arlington*

Finally, in *City of Mobile v. Bolden*,[56] the Court answered in the negative the question of whether the *Zimmer* factors would be employed in future dilution cases,[57] but a majority of the Court was unable to provide a new standard to fill the gap.[58] Justice White noted that this failure to provide a new standard left "the courts below adrift on uncharted seas."[59] The situation became even more confusing following the Court's subsequent decision in *Rogers v. Lodge*,[60] where the Court affirmed a finding of discriminatory intent based largely on use of the *Zimmer* factors, distinguishing the case from *Bolden* on the grounds that the district court had acknowledged that the intent requirement must be met.[61]

At this point, Congress entered the fray, statutorily returning voting rights standards to their pre-*Bolden* standing.[62] The 1982 amendments to section 2 of the Voting Rights Act[63] dis-

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Heights built on the foundation established in *Davis*, where African-American plaintiffs who were denied employment as police officers were required to carry the burden of showing discriminatory purpose rather than simply proving discriminatory impact. *Davis*, 426 U.S. at 242.

[56] 446 U.S. 55 (1980).

[57] *Bolden*, 446 U.S. at 90.

[58] *Id.* at 66-70. The plurality opinion, penned by Justice Stewart and joined by Chief Justice Burger and Justices Powell and Rehnquist, endorsed the use of an "invidious purpose" standard as had been adopted in recent equal protection cases, but distinguished this case from "equal population" cases more similar to *Reynolds*. *Id.* at 66. Justice Stevens would have established an even stricter standard of proof, requiring a plaintiff to prove that the adoption of the voting system was motivated solely by a discriminatory purpose with no other rational justification. *Id.* at 90-91 (Stevens, J., concurring). Justice White in dissent argued for continued reliance upon the "totality of the circumstances" test, as stated in *Zimmer*, which he found consistent with the intent requirement of *Washington v. Davis*. *Id.* at 101-03 (White, J., dissenting). Justice Marshall also dissented, reasoning that a plaintiff in a vote dilution case need only show discriminatory effect to succeed. *Bolden*, 446 U.S. at 116-17 (Marshall, J., dissenting).

[59] *Id.* at 103 (White, J., dissenting).

[60] 458 U.S. 613 (1982).

[61] *Rogers*, 458 U.S. at 620-21.

[62] *See* SENATE COMM. ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. REP. NO. 417, 97th Cong., 2d Sess., at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 192 (stating that 1982 amendments to Voting Rights Act were "designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*").

[63] The amended text of § 2 of the Voting Rights Act states:

pensed with the need for a plaintiff to prove discriminatory purpose or intent, and instead focused a court's inquiry on the "crucial question of whether minorities have equal access to the electoral process."[64] To aid courts in their determination of whether a practice denied a protected class of voters an equal opportunity to participate in the electoral process, the accompanying Senate Report further laid out a series of factors which indicate such a denial.[65] This renewal of a "results" test[66]

(a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2), as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of an electorate to participate in the political process and to elect representatives of their choice. The extent to which members of the protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided [t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

[64] S. REP. NO. 417, at 15-16, *reprinted in* 1982 U.S.C.C.A.N. at 192-93.

[65] S. REP. NO. 417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07. The primary factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to partici-

eases the post-*Bolden* burden on plaintiffs in claims based on section 2, but did not end the debate on the proper judicial standard in vote dilution cases.

Legal commentators continued to call for the Supreme Court to develop a judicially manageable standard for vote dilution cases, particularly in those cases dealing with at-large election systems.[67] A possible solution was offered by James Blacksher and Larry Menefee, counsel to the plaintiffs in *Bolden*, who noted the need for "a principled basis for judicial review and consistency of result in a variety of circumstances and in a variety of courts."[68] They proposed that:

> An at-large election scheme for a state or local multi-representative body is unconstitutional when jurisdiction-wide elections permit a bloc-voting majority, over a substantial period of time, consistently to defeat candidates publicly identified with the interests of and supported by a politically

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pate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 27-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07.

[66] *Id.*, at 2, *reprinted in* 1982 U.S.C.C.A.N. at 205. Under the "results" test, a plaintiff was not required to prove discriminatory intent but instead could show that the challenged system or practice, in the context of all the circumstances . . . result[ed] in minorities being denied equal access to the political process." *Id.*

[67] *See, e.g.*, Blacksher & Menefee, *supra* note 16, at 32 (stating that "[i]n spite of the political dangers perceived by the Court in articulating a judicially manageable standard of at-large racial vote dilution, the Supreme Court is subject to a constitutional and historical imperative to develop such a standard").

[68] *Id.* at 51. The authors concluded that one standard could not adequately address the range of circumstances presented by vote dilution situations. *Id.* at 50-51.

> cohesive, geographically insular racial or ethnic minority group.[69]

The Supreme Court in *Thornburg v. Gingles*,[70] its first review of section 2 after the 1982 amendments, clarified the judicial interpretation of the new state of the law. The Court stated that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[71] The Court, in examining the Senate factors, found racial polarization of voting to be the preeminent factor in establishing a claim of vote dilution.[72] The Court then established, relying heavily on the commentary of Blacksher and Menefee among other legal scholars, three "necessary preconditions" a plaintiff must show in order to prove a section 2 violation.[73] The Court stated:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. Third, the minority must be able to demonstrate that the

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[69] *Id.* at 51 (emphasis omitted). Blacksher and Menefee further noted that:

> To be consistent with [a] policy of judicial restraint, a standard for judging at-large vote dilution must be based not on a measure of group proportionality but on a determination that the complained-of underrepresentation is specifically attributable to, or proximately caused by, the choice of an at-large system rather than single-member districting.

Id. at 53.

[70] 478 U.S. 30 (1986).

[71] *Gingles*, 478 U.S. at 47. The Court recognized that, under certain voting schemes, the defeat of minority candidates resulted from the numerical inferiority of their supporters. *Id.* at 48.

[72] *Id.* at 47-49.

[73] *Id.* at 50-51 n.13. In fashioning a judicial standard for vote dilution claims, the majority cited extensively to several recent commentaries on the subject, most notably Blacksher & Menefee, *supra* note 16. *See Gingles*, 478 U.S. at 47 n.13 (citing numerous articles in support of proposition that at-large election systems can operate to dilute minority voting strength).

> white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority's preferred candidate.[74]

The Court cited to the Blacksher and Menefee article in support of each of the three preconditions,[75] and even a cursory review of the standard proposed by the two commentators reveals the similarities between it and the *Gingles* preconditions.[76]

III. Applying Post-*Gingles* Standards to Today's Voting Rights Cases

While the judicial standard offered by Blacksher and Menefee, as adopted by the *Gingles* Court, signaled a significant step forward in the search for a judicially manageable standard, it did not, and does not today, satisfy that goal. As noted earlier, Blacksher and Menefee themselves stated that a successful judicial standard must serve as "a principled basis for judicial review and consistency of result in a variety of circumstances and in a variety of courts."[77] Using this test to judge a standard's success in practice, it is obvious that the task of the Supreme Court is far from over.

An early problem in deciphering the *Gingles* mandate came where courts were faced with the issue of whether to allow minority groups to aggregate their numbers in order to meet the first prong of the *Gingles* test.[78] The first case to address this question was *League of United Latin American Citizens*

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[74] *Gingles*, 478 U.S. at 50-51. The Court further emphasized that "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election." *Id.* at 51.

[75] *Id.*

[76] *Compare supra* notes 68, 69 and accompanying text.

[77] Blacksher & Menefee, *supra* note 16, at 51; *see also supra* note 68 and accompanying text.

[78] *See generally* Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When is the Whole Greater Than the Sum of the Parts?*, 20 Tex. Tech L. Rev. 95, 111-13, 128-44 (1989) (discussing shortcomings of *Gingles* test and offering solutions in determining whether minorities should be permitted to aggregate their numbers).

(LULAC) v. Midland Independent School District,[79] a case from the Fifth Circuit. In *LULAC*, African-American and Mexican-American voters challenged the school district's at-large method of electing its trustees.[80] In the district, Mexican-Americans constituted 15.9% of the total population, while African-Americans constituted 9.6%.[81] In attempting to meet the first prong of the *Gingles* test, the ability to constitute a majority in a single-member district, the plaintiffs aggregated the populations of both minority groups in proposing a single-member plan with two majority-minority districts.[82] The district court allowed the aggregation and accepted the plaintiffs' plan, stating that "to not allow an aggregation for the satisfaction of prong one [of the *Gingles* test] would be inherently unjust."[83]

On appeal, a panel of the Fifth Circuit took a more exacting approach to the aggregation question. The court examined the arguments espoused by the school district at the trial level, particularly the argument that African-Americans and Mexican-Americans failed to form a "politically cohesive" group in the district.[84] Judge Wisdom, writing for the majority, rejected this argument but had to resort to historical analogies to support his reasoning in light of the lack of guidance from the Supreme Court.[85] The holding was vigorously attacked by

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[79] 648 F. Supp. 596 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1494 (5th Cir.), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987) (*en banc*).

[80] *LULAC*, 648 F. Supp. at 597. The plaintiffs requested that the court order the district to adopt a single-member system in future elections. *Id.* at 598.

[81] *Id.* at 605. Although the remaining population was of Anglo descent, Blacks comprised 92.43% of the population within one city district while Hispanics comprised 73.7% in another. *Id.*

[82] *Id.* at 605-06. For example, District 1 of the plaintiffs' plan had a "total minority representation" of 71.5%. *LULAC*, 648 F. Supp. at 606. Of that total, 45.81% of the population were African-Americans and 25.68% were Mexican-Americans. *Id.*

[83] *Id.* The court further stated that it could not "conceive of the Supreme Court's decision leaving room for any other interpretation." *Id.*

[84] *LULAC*, 812 F.2d at 1501. In support of this argument, the school district offered a study conducted by the University of Texas. *Id.* The study concluded that the two minority groups had "mutually exclusive interests and . . . [were] politically distinct." *Id.*

[85] *Id.* Judge Wisdom wrote that "[a]llegiances against a common enemy by

Judge Higginbotham who, in his dissent, reasoned that the aggregation of minority groups to meet the first prong of the *Gingles* test "risks that ephemeral political alliances having little or no necessary connection to discrimination will be confused with cohesive political units joined by a common disability of chronic bigotry."[86] Judge Higginbotham also alluded to the results-oriented nature of voting rights jurisprudence by noting that "[i]n the last measure, the judgment becomes no more than a judicial sense that its result is more 'just' than the challenged plans."[87]

The panel opinion in *Midland* was later vacated on other grounds,[88] but the Fifth Circuit revisited the aggregation question soon after in *Campos v. City of Baytown*.[89] As in *LULAC,* the plaintiffs in *Campos* consisted of African-American and Mexican-American voters challenging an at-large system, this time one employed in city council elections.[90] In addressing the first prong of the *Gingles* test, the district court allowed aggregation, finding that "Blacks were cohesive, Hispanics were cohesive, together the minority group was cohesive, and that Anglos voted sufficiently as a bloc to usually defeat the minority's preferred candidate."[91] The court found a section 2 violation and ordered the city to submit a new election plan,

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nations or groups otherwise dissimilar are frequent both in history and in current events." *Id.* No Supreme Court cases were cited in support of this holding. *LULAC*, 812 F.2d at 1501-02.

[86] *Id.* at 1504 (Higginbotham, J., dissenting). He asserted that the finding of cohesiveness should align with the goal to secure voting rights for minorities in light of discrimination. *Id.* (Higginbotham, J., dissenting).

[87] *Id.* at 1507 (Higginbotham, J., dissenting).

[88] *LULAC,* 829 F.2d 546, 547 (5th Cir. 1987) (*en banc*) (holding that school district's plans violated Texas law and was therefore not entitled to deference).

[89] No. Civ. A. H-85-1021, 1987 WL 8736 (S.D. Tex. Mar. 25, 1987), *vacated*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

[90] *Campos*, 1987 WL 8736, at *1. The election system required a candidate to reside in the particular district which he or she sought to represent, but the election was determined by a vote of all voters in the city. *Campos*, 840 F.2d at 1241-42. Such a system is often referred to as a "numbered-place" or "numbered-post" election. *Id.* at 1242 n.1; *Campos*, 840 1987 WL 8736, at *1.

[91] *Campos*, 840 F.2d at 1242. The district court only reviewed the circumstances of elections with minority candidates and concluded that the minority group met the qualifications "to form a majority in a single member district." *Id.*

which it subsequently accepted largely on the basis of legislative deference.[92]

The Fifth Circuit, sounding remarkably like the Supreme Court in *White*, began its review of the case by noting that the "ultimate finding of minority voter dilution" was based on the "totality of the circumstances" and that the lower court's finding was subject to a "clearly erroneous" standard on review.[93] The court immediately followed this statement of deference by upholding the district court's aggregation decision.[94] The majority cited no case law in support of this holding, instead taking the opposite approach by reasoning that "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."[95]

A holding such as that in *Campos* was necessitated not by the facts of the case, but by the lack of a judicially manageable standard. As compared to the early Fifth Circuit cases discussed above, this was arguably not a case of a starkly unjust situation but rather an evaluation on the scope of the Voting Rights Act. The *Midland* and *Campos* courts had to address factual patterns that did not point towards a particular result, define the boundaries of the Act, and then apply those boundaries in the case on the basis of what seemed "just" in the circumstances.[96] Such results are far from consistent though, as other circuits addressing the same aggregation question have

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[92] *Id.* The district court reasoned that "[e]ven if the legislative plan is not the optimum choice, federal courts must defer to legislative judgment absent the unconstitutionality or illegality of the plan." *Campos*, 1987 WL 8736, at *1 (citing Seastrunk v. Burns, 772 F.2d 143, 151 (5th Cir. 1985)).

[93] *Campos*, 840 F.2d at 1243. The *White* Court also prominently discussed the favored viewpoint of the trial judge, as well as setting forth the "totality of the circumstances" test. *See supra* note 13 and accompanying text.

[94] *Campos*, 840 F.2d at 1244. The court rationalized that the prerequisite to an election system challenge was a showing that minority voters could indeed elect their representatives but for an illegal practice. *Id.*

[95] *Id.*; *see also* League of United Latin Am. Citizens v. North E. Indep. Sch. Dist., 903 F. Supp. 1071, 1092 nn.157-58 (W.D. Tex. 1995) (citing *Campos* in support of holding allowing aggregation on showing that "the minority group together votes in a cohesive manner for the minority candidate").

[96] *See supra* notes 83, 87 and accompanying text.

reached the opposite conclusion despite similar pleadings by the plaintiffs and similar factual settings.[97] In the area of multi-race districts, the present tests simply do not lead to the "consistency of result in a variety of circumstances and in a variety of courts"[98] that is the fundamental test of a workable judicial standard.

The same difficulties are evident in cases which would be considered to be more traditional. The driving force behind these difficulties is that today's courts are seldom faced with starkly unjust situations, but rather with new twists in the factual situations. Today's voting rights plaintiff carries the burden of convincing the court that a violation occurred or is occurring, while the violations in previous cases were so evident that the court simply had to fashion the law around the proper holding. When a voting rights violation is not obvious from the beginning, today's courts must look to the established judicial standards in an effort to decide if a viable claim exists. The case of *East Jefferson Coalition for Leadership & Development v. Parish of Jefferson*[99] provides a perfect example of the task before a district court. In *East Jefferson*, African-American residents of the Parish challenged the election system employed in council elections.[100] While the plaintiffs established a lack of electoral success,[101] the defendants pointed to the low minority population in the parish as the determinative factor rather than a section 2 violation.[102] The district court found

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[97] *See, e.g.*, Latino Political Action Comm., Inc. v. City of Boston, 609 F. Supp. 739, 746-47 (D. Mass. 1985) (rejecting plaintiffs' argument that three distinct minority groups had cohesive voting patterns), *aff'd*, 784 F.2d 409 (1st Cir. 1986); Romero v. City of Pomona, 665 F. Supp. 853, 858 (C.D. Cal. 1987) (refusing aggregation on basis of lack of cross-voting by African-American and Mexican-American voters in previous elections).

[98] *See supra* notes 68, 69 and accompanying text.

[99] 706 F. Supp. 470 (E.D. La. 1989), *aff'd*, 926 F.2d 487 (5th Cir. 1991).

[100] *East Jefferson*, 926 F.2d at 489. The Parish was divided into four districts, with one council member elected from each. *Id.* Members were also elected by an at-large votes in two "flotorial" districts. *Id.* The council's chairman was elected by an at-large vote of the parish. *Id.*

[101] *Id.* In the previous four parish elections, four minority candidates had sought office and none had succeeded. *East Jefferson*, 926 F.2d at 489.

[102] *Id.* African-Americans constituted 11.78% of the voting age population in

that the minority population of Jefferson Parish was "widely dispersed,"[103] a factor seemingly at odds with the *Gingles* precondition that the minority group be "geographically compact."[104] Despite the obvious impact of this finding on a proper *Gingles* analysis, the court found that the parish electoral system violated section 2 of the Voting Rights Act.[105] The plaintiffs, apparently recognizing the importance of the district court's finding on minority population dispersion, made a post-trial motion to amend the finding. However, the motion was denied.[106] Following the adoption of a court-modified electoral system,[107] the district court did modify its findings of fact concerning population dispersion at the request of the Justice Department.[108]

If we are to assume that the district court intended to apply the *Gingles* test, it is difficult to fathom the court's holding in light of their initial findings of fact. However, as stated by the Fifth Circuit on appeal, the applicable judicial standard required the district court to initially consider the three *Gingles* preconditions[109] and subsequently to evaluate the case based on the "totality of the circumstances."[110] In this analysis, the

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Jefferson Parish, while comprising 13.86% of the total parish population. *Id.* (citing to 1980 U.S. Census statistics).

[103] *See id.* (reiterating district court's findings of fact).

[104] *See supra* note 74 and accompanying text.

[105] *Campos*, 926 F.2d at 489 (noting holding of lower court despite finding of minority population dispersion).

[106] *Id.* The plaintiffs made the motion although the district court upheld this assertion that Jefferson Parish's electoral scheme diluted black voting power. *Id.*

[107] *See id.* at 490 (discussing modification and adoption of parish's redistricting proposal). The new system called for six single-member districts and one at-large district. *East Jefferson*, 926 F.2d The Justice Department precleared the plan on submission from the parish. *Id.* at 491. This preclearance followed a prior rejection by the Justice Department, on the grounds that a prior submission of a similar six-one plan "may well have been motivated by an invidious purpose to minimize black voting strength in the proposed districting plan." *See id.* (quoting letter from Justice Department).

[108] *Id.* at 491. The amended findings of fact reflected the verbatim language of the *Gingles* test, stating that "the minority group is sufficiently large and geographically compact to constitute a majority within a single-member district." *See id.* (quoting district court's findings).

[109] *Id.*; *see also supra* note 74 and accompanying text.

[110] *East Jefferson*, 926 F.2d at 491 (citing Thornburg v. Gingles, 478 U.S. 30,

court had to evaluate the seven primary Senate factors as well as the two additional Senate factors with little to no guidance on how to weigh the factors.[111] When a trial court is faced with such a "panoply of factors,"[112] the danger of holdings inconsistent with the judicial standard increases. Given the confusion inherent in the present judicial standard, it is not surprising that the Fifth Circuit afforded the district court wide latitude to amend its findings of fact to make it consistent with the court's holding, even after that holding had been delivered.[113]

Inconsistencies between the findings of fact and the holding of a trial court demonstrate the lack of judicial understanding concerning present voting rights standards. The confusion over what findings of fact were necessary to support a holding in a voting rights case again resurfaced in the case of *Westwego Citizens for Better Government v. City of Westwego*.[114] *Westwego* involved a challenge to an at-large system for electing city aldermen.[115] Although no minority candidate had

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79 (1986)).

[111] *Id.*; *see also supra* note 65 and accompanying text. The only guidance from the Supreme Court on the evaluation of these factors came in *Gingles*, where the Court noted that racial polarization of voting served as the preeminent factor but established no guidelines for evaluating of the other primary factors or either of the two additional factors. *See supra* note 72 and accompanying text.

[112] *See* Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (noting "panoply of factors" identified by Supreme Court as relevant to dilution inquiry), *cert. granted sub nom.*, East Carroll Parish Sch. Bd. v. Marshall, 422 U.S. 1055 (1975), *aff'd*, 924 U.S. 636 (1976). The *Zimmer* court found the abundance of factors so confusing for the trial courts that it fashioned a new dilution test to fill the void. *See supra* notes 51-52 and accompanying text.

[113] *See East Jefferson*, 926 F.2d at 491-92 (finding that lower court improperly invoked FED. R. CIV. P. 52(b) to support amendment to findings of fact). The Fifth Circuit noted that the amended findings were still within the lower court's discretion if supported by other proper grounds. *Id.* at 492 (citing Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 193 (5th Cir. 1990)). The court held that such grounds existed on the basis of the Fifth Circuit's previous remand order "for imposition of a remedy." *Id.*

[114] 872 F.2d 1201 (5th Cir. 1989), *on remand*, No. Civ. A. 84-5599, 1989 WL 73332 (E.D. La. June 28, 1989), *remanded by* 906 F.2d 1042 (5th Cir. 1990), *and rev'd and rendered and remanded by* 946 F.2d 1109 (5th Cir. 1991).

[115] *Westwego*, 872 F.2d at 1202. The system also employed a majority vote requirement. *Id.*

even run for an alderman position, plaintiffs attempted to prove that Westwego voting patterns were so polarized that a minority candidate could not be elected under the at-large system.[116] The plaintiffs also sought to establish a history of racial discrimination in the state and parish, and that the present government was not responsive to minority concerns.[117] However, following a two-day bench trial, the claim was dismissed.[118]

On appeal, the Fifth Circuit remanded the case for specific findings of fact and conclusions of law "necessary to support a judgment."[119] The court noted that detailed findings of fact are needed in vote dilution cases due to the "unusually complex factual patterns."[120] Of particular importance was the district court's failure "to take note of substantial contrary evidence."[121] The court stated that "[p]erhaps in no other area of law is as much specificity in reasoning and fact finding required, *as shown by our frequent remands of voting dilution cases to district courts*."[122] Assuming logically that district court judges are not simply ignoring the clear mandate of the Fifth Circuit on the issue of specificity in findings of fact, this trend of remanding cases serves as another indication that the lower courts are not adequately equipped with a workable judi-

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[116] *Id.*

[117] *Id.* In addition, the plaintiffs attempted to prove that Westwego city officials were not responsible to claims of discrimination made by Westwego black citizens. *Id.*

[118] *Westwego*, 872 F.2d at 1203. The reasons for dismissal were given orally by the trial judge after all the evidence was presented. *Id.*

[119] *Id.* at 1204.

[120] *Id.* at 1203 (citing Velasquez v. City of Abilene, 725 F.2d 1017, 1020 (5th Cir. 1984) (quoting Cross v. Baxter, 604 F.2d 875, 879 (5th Cir. 1979), *vacated on other grounds*, 704 F.2d 143 (5th Cir. 1983))). This mandate has led some district courts, seemingly in an effort to avoid a subsequent remand, to pen exhaustive findings of fact. *See, e.g.*, League of Latin Am. Citizens v. North East Indep. Sch. Dist., 903 F. Supp. 1071, 1075-89 (W.D. Tex. 1995) (listing 96 separate findings of fact).

[121] *Westwego*, 872 F.2d at 1203 (quoting *Velasquez*, 725 F.2d at 1021).

[122] *Id.* (citing *Velasquez*, 725 F.2d at 1020 (quoting *Cross*, 604 F.2d at 879)) (emphasis added); *see also* Teague v. Attala County, 17 F.3d 796, 798 (5th Cir. 1994) (remanding case on basis of insufficient factual findings).

cial standard that allows for "consistency of result."[123]

The recent case of *Houston v. Lafayette County*[124] provides an excellent final example of how the above discussed problems as well as many other factors, such as innovative defenses to vote dilution claims,[125] have led to confusion in the application of today's judicial standards. Such confusion is directly traceable to the lack of a manageable judicial standard to guide a trial court's task. In *Houston*, African-American residents challenged the county's system for electing supervisors.[126] Under the established system, supervisors were elected from five single-member districts of relatively equal population.[127] African-American voters were dispersed throughout the five districts, and therefore did not constitute a majority in any district.[128] At the date of the trial, an African-

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[123] *See supra* notes 68, 78 and accompanying text.

[124] 841 F. Supp. 751 (N.D. Miss. 1993), *vacated and remanded*, 56 F.3d 606 (5th Cir. 1995).

[125] *See also* Salas v. Southwest Texas Junior College Dist., No. Civ. A. DR-88-CA-18, 1991 WL 367969, at *1 (W.D. Tex. Feb. 25, 1991) (dealing with challenge to at-large system of electing members to board of trustees), *aff'd*, 964 F.2d 1542 (5th Cir. 1992). In *Salas*, the defendants argued that the lack of electoral success by Hispanic voters in the district was attributable not to vote dilution but to the failure of the Hispanic community to participate in the electoral process. *Salas*, 964 F.2d at 1555. This argument was grounded in the fact that Hispanics constituted 63% of the total population in the district and 57% of the voting age population. *Id.* at 1544. The district court stated that it was "hesitant to intervene when those same Hispanics could readily solve this problem by simply running candidates and turning out to vote." *Id.* at 1555 (quoting *Sales*, 1991 WL 378969 at *7). On appeal, the Fifth Circuit noted a wide range of evidentiary opportunities the plaintiffs had at their disposal to prove dilution despite the population figures. *Id.* at 1555-56. At the trial, the district court had to weigh evidence that the district's registration figures were the result of "soft" voting rolls, that the majority figures were "illusory" due to "practical impediments" to voting, and that the low minority voter turnout was the result of past electoral discrimination. *Id.* The Fifth Circuit decided against reevaluating the district court's weighing of these numerous factors, instead affirming on the grounds that "the district court's ultimate finding that the cause of the Hispanic voters' lack of electoral success is failure to take advantage of political opportunity, rather than a violation of § 2, is not clearly erroneous." *Salas*, 964 F.2d at 1556.

[126] *Houston*, 841 F. Supp. at 754.

[127] *Id.* The district court also noted the similarity between this system and the system employed in other counties in Mississippi. *Id.* (citing Teague v. Attala County, 807 F. Supp. 392, 396 (N.D. Miss. 1992)).

[128] *Id.* Census statistics from 1990 indicated that African-Americans comprised

American candidate had never been elected as a district supervisor in Lafayette County.[129]

The trial itself demonstrated the analytical problems now facing trial courts in dealing with the tremendous volumes of evidence offered in a modern voting rights case. The plaintiffs submitted two alternative voting plans, both creating a single majority-minority district, in support of their assertion that the minority group was "sufficiently large and geographically compact to constitute a majority in a single-member district."[130] The plaintiffs also sought to establish the existence of racial bloc voting by resorting to two methods of statistical analysis: bivariate ecological regression and extreme case analysis.[131]

Predictably, the defendants countered with both ecological regression studies and extreme case analysis that tended to show that racially-polarized voting did not exist in Lafayette County.[132] The defendants also directed the court's attention to the fact that although an African-American had never been elected to the position of district supervisor,[133] African-American candidates, or alternatively minority preferred candidates,

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approximately 25% of the total county population. *Id.* Under the current system, African-American voters constituted no more than 38% of the voting age population in any of the five districts. *Id.* at 755.

[129] *Id.* at 759.

[130] *Id.* at 760-62; *see also supra* note 75 and accompanying text.

[131] *Houston*, 841 F. Supp. at 763. The Fifth Circuit has given a relatively succient definition of these two methods of analysis:

> Bivariate ecological regression generates predictions of the correlation between election results and the race of the residents voting in the election. Statisticians use the correlations to estimate the percentages of black residents' and white residents' support for particular candidates. Extreme case analysis evaluates the actual election choices of voters in precincts whose residents are predominately—80-90%-plus—of one race. Both methods of analysis utilize correlation coefficients and measures of statistical significance to determine the degree of confidence with which to view the estimates and predictions produced by the methods.

Houston, 56 F.3d 606, 609 n.1 (5th Cir. 1995). The plaintiffs' expert analyzed 19 primary elections, 14 using the regression method and 5 using the extreme case analysis. *Id.* at 609.

[132] *Id.* However, the defendants chose not to analyze the same election data used by the plaintiffs. *Id.*

[133] *See supra* note 131 and accompanying text.

had enjoyed measurable success in winning election to public office in Lafayette County.[134] The court noted that "[i]n twenty-four key elections," the minority preferred candidate was elected in two-thirds of the races.[135]

This evidence of minority electoral success seemed to play a kind of wild-card role in the district court's final determination. In dismissing the plaintiffs' case, the court focused an inordinate portion of its opinion on a break-down of individual races involving minority candidates.[136] More importantly, although the evidence of minority electoral success appears to be properly considered as one of the Senate factors in the "totality of the circumstances" analysis,[137] the court also weighed the evidence in its evaluation of whether the second and third *Gingles* factors[138] were met.[139] The court did not clarify the impact of this evidence on its final decision to dismiss the case, so it is difficult to evaluate its effect. Rather, the court discussed the competing analyses of the plaintiffs' and defendants' experts, concluding that the defendants' expert provided the most credible interpretations of voting patterns in Lafayette County.[140]

The court also offered a somewhat limited analysis of the evidence relating to the first *Gingles* factor. The court placed substantial weight on the fact that the plans proposed by the plaintiffs resulted in "a lopsided, distorted, and disjointed geo-

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[134] *See Houston*, 841 F. Supp. at 757-60 (discussing minority electoral success in Lafayette County).

[135] *Id.* at 757.

[136] *See supra* note 134 and accompanying text.

[137] *See supra* note 65 and accompanying text.

[138] *Houston*, 841 F. Supp. at 760. The district court reasoned that "[t]he upward trend in support behind . . . black candidates suggests growing participation among blacks in the voting process and/or *crossover voting by whites for a black candidate*." *Id.* (emphasis added).

[139] *See id.* at 763 (combining analysis of second and third *Gingles* preconditions into section titled "Racial Bloc Voting").

[140] *Id.* at 763-64. The court held that the analysis performed by the plaintiffs' expert failed to take into account factors relevant to a determination of racial bloc voting. *Id.* at 764. On the other hand, the court determined that the defendants' expert "incorporated other acceptable research methods associated with history, and the political and social sciences." *Houston*, 841 F. Supp. at 764.

graphic scheme."[141] Notably though, the court cited no authority in support of reliance upon this factor in dismissing the plaintiffs' case.

The district court continued its opinion by holding that, even if the plaintiffs had succeeded in meeting their *Gingles* burden, their section 2 claim would still fail based on the "totality of the circumstances."[142] Significantly, the court did not mention any of the Senate factors which are to be weighed in this analysis.[143] The court again noted the electoral success of African-American candidates in Lafayette County,[144] but subsequently returned to a discussion seemingly focused on the failure of the plaintiffs to demonstrate that the minority group met the *Gingles* precondition of geographic compactness.[145] The court stated:

> [b]y no means was the [Voting Rights Act] enacted to ensure the success of black or other minority candidates by carving the political terrain into irregularly and artificially shaped designs and patterns that result in the deliberate creation of 'safe' majority minority districts reserved exclusively for minority candidates to represent.[146]

The court cited the recent Supreme Court case of *Shaw v. Reno*[147] in support of this assertion.[148] The court further en-

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[141] *Id.* at 762. The *Houston* court argued that the irregular shape of the voting district proposed by the plaintiffs' plan demonstrated both lack of size and "geographical compactness necessary to comprise a majority minority district." *Id.*

[142] *Id.* at 764-65.

[143] *See supra* note 65 and accompanying text; *see also Houston*, 56 F.3d 606, 610 (noting requirement that trial court weigh Senate factors in determining "totality of the circumstances" holding).

[144] *Houston*, 841 F. Supp. at 765; *see also* note 134 and accompanying text.

[145] *Houston*, 841 F. Supp. at 765. The court stated that the purpose of § 2 was to eliminate obstacles preventing minorities for participating in the political process. *Id.*

[146] *Id.*

[147] 113 S. Ct. 2816 (1993). *Shaw* involved an equal protection challenge to a congressional reapportionment plan, which included two majority-minority districts, passed by the North Carolina General Assembly. *Shaw*, 113 S. Ct. at 2819-20. A 5-4 majority held that:

> appellants have stated a claim under the Equal Protection Clause by

gaged in a lengthy policy analysis, noting that "legal scholars . . . had begun to scrutinize the worthiness of electoral districts custom designed for minorities."[149]

A reading of the district court's opinion leads the reader to the inevitable question of what judicial standard the court was trying to apply. The Fifth Circuit demonstrated a similar impression of the opinion by vacating and remanding the case in a highly critical opinion penned by Judge Garza.[150] The court first held that the district court erred in its analysis of the plaintiffs' claim under the first of the *Gingles* preconditions because "[c]ompactness . . . is not as narrow a standard as the district court construed it to be."[151] The majority also found that the district court improperly disregarded the conclusions of the plaintiffs' expert in exploring the existence of racial bloc voting.[152] Finally, the court determined that the factual find-

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> alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.

Id. at 2832.

[148] *Houston*, 841 F. Supp. at 765. The district court interpreted Justice O'Conner's majority opinion in *Shaw* to express an "extreme distaste for racial gerrymandering." *Id.*

[149] *Id.* The court noted the extensive writings of Professor Lani Guinier on this subject. *Id.* Specifically, the court quoted Professor Guinier's statement that "safe, minority seats discourage political competition and thus further diminish [voter] turnout." *Id.* at 766 (quoting Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1455 (1991)).

[150] *Houston*, 56 F.3d 606, 608 (5th Cir. 1995). The opinion was unanimously joined by Circuit Judges King and DeMoss. *Id.*

[151] *Id.* at 611. The court reasoned that "[t]he first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the black population be sufficiently compact to constitute a majority in a single-member district." *Id.* (quoting Clark v. Calhoun County, 21 F.3d 92, 95 (5th Cir. 1994)). The court also stated that the plan proposed by the plaintiffs did not created districts as "bizarre" as those evidenced in *Shaw*. *Id.* On this basis, the court held that the district court's primary focus should not have been on the shape of the districts in the plaintiffs' proposed plan. *Id. See generally* Richard G. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993) (evaluating districts similar to those proposed by plaintiffs in instant case).

[152] *Houston*, 56 F.3d at 612. Judge Garza wrote that the district court could not summarily reject the statistics of the plaintiffs' expert, especially in light of

ings of the district court were insufficiently detailed to serve as a basis for appellate review,[153] a surprising holding in light of the frequent warnings previously issued by the Fifth Circuit on this issue.[154]

The *Houston* decisions demonstrate just how far two courts can diverge in interpreting the mandates of our present judicial standards in voting rights jurisprudence. The Fifth Circuit, once surviving in voting rights litigation by the employment of a pragmatic judicial approach, now evidences the kind of inconsistent case law inherent where a manageable judicial standard is lacking. Inconsistent interpretations of precedent, insufficient findings of fact, and, consequently, frequent remands by the court of appeals are common in the Fifth Circuit. As the Supreme Court's rejection of the *Zimmer* test aptly demonstrated, the Fifth Circuit does not control its destiny in this area of the law. Instead, the Fifth Circuit, and the rest of the country, must wait patiently for the Supreme Court to accept the challenge of creating a workable and stable judicial standard.

IV. CONCLUSION

Today's courts are not commonly faced with yesterday's starkly unjust situations which often bordered on vote denial rather than vote dilution.[155] Rather, parties to voting rights litigation are presenting trial courts with arguments never envisioned by the *Reynolds* majority a few decades ago. It is difficult to imagine how the *Reynolds* majority would respond to a question of vote dilution in a district where minority voters comprised a majority of the population, or to an aggregation question in a multi-ethnic/multi-race district. You can almost

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the evidence's probative value. *Id.*; *see also* Teague v. Attala County, 17 F.3d 796, 798 (5th Cir. 1994) (remanding similar holding on grounds that "in light of its intensely fact-specific inquiry here, the district court ought to have discussed appellants' statistical evidence more thoroughly because that was the principal evidence they offered and because their statistics had at least surface plausibility").

[153] *Houston*, 56 F.3d at 612.

[154] *See supra* note 122 and accompanying text.

[155] *See supra* note 33 and accompanying text.

hear the ghost of Harlan trying to warn the Court of the pitfalls in the path ahead.

Regardless of the validity of Harlan's warnings, voting rights jurisprudence appears firmly entrenched. As a result, the Supreme Court must step forward and fulfill its constitutional duty by enacting a manageable judicial standard.[156] As is evident in the Fifth Circuit, the lower courts cannot continue with their pragmatic approach to voting rights claims with any hope to achieve "consistency of result in a variety of circumstances and in a variety of courts."[157]

Jeremy M. Taylor

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[156] *See supra* note 67 and accompanying text.
[157] *See supra* note 68 and accompanying text.

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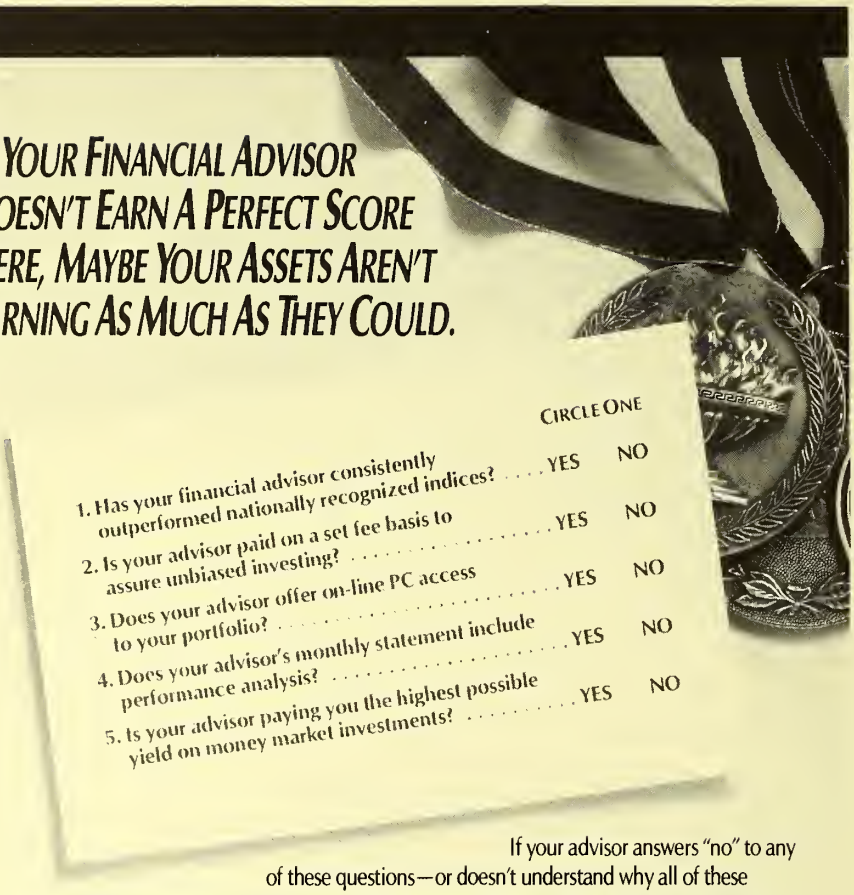

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